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7-109
NO. 11612

In the United States Circuit Court of
Appeals for the Ninth Circuit

ALMOND G. FULLER, APPELLANT,

v.

THE UNITED STATES OF AMERICA, APPELLEE.

On Appeal from the District Court
for the Territory of Alaska,
Third Division

BRIEF FOR THE APPELLEE

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FILED

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SUBJECT INDEX

	Page
Statement of the Case	1
Jurisdictional Statement	2
Statement of Facts	2
Argument:	
I. There was no error on the part of the trial court in admitting into evidence for consideration by the jury the confession made by appellant to agents of the Federal Bureau of Investigation.....	4
II. The trial court did not err in admitting into evidence plaintiff's photographic exhibits I and II	21
III. The trial court did not err in refusing to instruct the jury to find the appellant not guilty of murder in the second degree on the grounds that the offense charged did not have sufficient evidence to submit it to the jury in justifying a verdict of murder in the second degree	29
Conclusion	45

TABLE OF AUTHORITIES

CASES:

Ah Fook Chang v. United States, 91 F. 2d 805	7, 18
Bell v. United States, 47 F. 2d 438	16
Bishop v. United States, 107 F. 2d 297	44
Davis v. United States, 32 F. 2d 86	20
Gray v. United States, 9 F. 2d 337	17
Hartzel v. United States, 72 F. 2d 569	17
Hopt v. People, 104 U. S. 631	29
Lisenba v. California, 314 U. S. 219	18
Lyons v. Oklahoma, 322 U. S. 596	6, 17
Madden v. United States, 20 F. 2d 289.....	28
Mergmer v. United States, 147 F. 2d 572	15, 18
Nestlerode v. United States, 112 F. 2d 56.....	42
Osborn v. People, 262 P. 892	6, 11, 18
People v. Collins, 5 N. W. Rep. 2d 556.....	35
People v. Howard, 295 P. 333	38
People v. Lami, 36 P. Rep. 2d 192	43
People v. Loper, 112 P. 720	19
People v. Manning, 50 N. E. 2d 118	28
People v. Murphy, 32 P. 2d 635	33
People v. Odom, 164 P. 2d 68	34
People v. Shaver, 61 P. 2d 1170	28
Perrygo v. United States, 2 F. 2d 181	20
Purpura v. United States, 262 F. 473	20
Roman v. State, 201 P. 551	11, 13
Skiskowski v. United States, 158 F. 2d 177.....	16
Smith v. United States, 269 F. 860	44
Sparf & Hanson v. United States, 156 U. S. 51.....	5, 30
State v. Blodgett, 92 P. 820	5
State v. Compton, 205 N. W. 31	28
State v. Cunningham, 144 P. 2d 303	24
State v. Eggleston, 297 P. 162	24
State v. Henderson, 184 P. 2d 392	16, 19, 26, 39
State v. Nelson, 92 P. 2d 182	21, 27

	Page
State v. Rees, 107 P. 893	32
State v. Smith, 83 P. 2d 749	25, 37
State v. Trapp, 109 P. 1094	43
State v. Wallace, 131 P. 2d 222	44
State v. Walsh, 232 P. 194	28
State v. Weaver, 58 P. 109	43
State v. Weston, et al., 64 P. 2d 536.....	22
State v. Williams, 257 P. 619	28
Stevenson v. United States, 162 U. S. 313	31
Sykes v. United States, 143 F. 2d 140.....	7
Taylor v. State, 225 P. 988	15
Territory v. Emilio, 89 P. Rep. 239	11
Tucker v. United States, 151 U. S. 164.....	30
United States v. Edmonds, 63 F. Supp. 968	40
United States v. King, 34 F. Rep. 302	40
United States v. Lolardo, 67 F. 2d 883	20
United States v. Mitchell, 322 U. S. 65.....	9
United States v. Ruhl, 55 F. Supp. 641	8, 17
Vili Birghi v. State, 43 P. 2d 210	28
Wheeler & Patton v. United States, 165 F. 2d 225.....	8, 18
Wuichet v. United States, 8 F. 2d 561.....	38
Young et al. v. Territory of Hawaii, 163 F. 2d 490.....	6, 18

TEXTS:

6 Corpus Juris Secundum, Sec. 116, p. 980	28
23 Corpus Juris Secundum, Sec. 852, p. 51, 52	28
Compiled laws of Alaska 1933, Sec. 4759.....	29

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11612

ALMOND G. FULLER, APPELLANT,

v.

THE UNITED STATES OF AMERICA, APPELLEE.

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

On the 3rd day of October, 1946 the grand jury filed in the District Court for the Territory of Alaska, Third Judicial Division, an indictment charging the appellant with murder in the second degree in violation of Section 4759, C. L. A., 1933. On the 11th day of October, 1946 the appellant, through his counsel, George B. Grigsby, Esquire, withdrew a plea of not guilty previously entered on the 9th day of October, 1946, and entered a plea of guilty to the crime of murder in the second degree as set forth in the indictment. (R. 324). Subsequently, on the 19th day of October, 1946, the appellant appeared in court with his attorney, George B. Grigsby, and withdrew the plea of guilty and entered a plea of not guilty to the charge of second degree murder as set forth in the indictment. After a trial by jury appellant was convicted of second degree murder and was sentenced to imprisonment for a period

of twenty-four years, on which judgment this appeal followed.

JURISDICTIONAL STATEMENT

The statement of jurisdiction is properly set forth in appellant's opening brief (p. 1).

STATEMENT OF FACTS

On the 17th day of July, 1946, the appellant, in company with one Jean Mackey, with whom he had been living, arrived in Anchorage on the train from Whittier. From the depot they went to the residence of a friend of Fuller's by the name of Glen McCall, stopping on the way, however, to purchase liquor. There had been drinking on the train enroute to Anchorage but the appellant was not drunk upon arrival (R. 233). However according to appellant, considerable liquor was consumed after arriving at McCall's. Approximately 10:00 o'clock in the evening of the day in question Fuller paid a visit to one Alfonso Freeland, a Negro who lived nearby at 1108 E Street. He did not remember the exact time but places it at around 10:00 o'clock (R. 249). He went alone at first and he and Freeland had some conversation, and appellant departed and later returned with Jean Mackey (R. 250), taking with him two bottles of liquor (R. 252). Freeland was alone in his home at this time (R. 233-237) and later on another colored man by the name of Thomas Jones came in to visit Freeland. According to the testimony of Alfonso Freeland he had intercourse with Jean Mackey after Fuller stated to him that it would be all right. While this act was taking place Fuller retired to the kitchen (R. 69). Upon Jones' arrival, which was about 11:00 or 11:30 in the evening, Fuller, the appellant, and Jean Mackey were in the double bed together. Freeland was in a single bed in the same room (R. 90). Fuller told Jones to come and get in bed with them (R. 91). Appellant

had intercourse with Jean Mackey, after which he asked Jones if he cared for some. After Jones had completed the act of intercourse with Jean Mackey, Fuller requested her to have unnatural relations with him, and upon her refusal, he slapped her. She started bleeding and arose from the bed, going into the kitchen, with Fuller following her. There was a scuffle in the kitchen (R. 91). Jones later went outside and saw Fuller standing in the yard, naked, with blood on his chest.

Upon looking for Jean Mackey, Jones found her lying in the body of a truck with her face bruised. He brought out a wet towel and the appellant wiped the woman's face. Jones returned to bed, and Fuller came in and got clothes and went back outside. Following the scuffle in the kitchen the appellant Fuller proceeded to brutally assault the deceased, Jean Mackey, by beating her and kicking her while she was on the ground (R. 138). This took place at approximately 1:00 a. m.

Ted Bruckbauer had seen Fuller earlier in the evening at Freeman's house through the pantry window at about 9:30 or 10:00 o'clock, at which time appellant appeared to be in a good mood (R. 162). Bruckbauer further testified as to the beating, stating that Fuller had beaten his victim severely about the head and kicked her at a time when she was on the ground and apparently unconscious. After the severe beating and kicking administered to the unresisting body of the victim, the appellant went into the house and shortly returned, after which he again resumed his assault upon the prostrate body of the woman (R. 139 and R. 162). He then grabbed her by the hair of the head and dragged her to the alley and placed her in the body of an old panel truck, where she was discovered the following day with her body entirely concealed by a covering of old rags, etc., with only the fingers exposed.

Following this assault, according to the appellant's testimony, he next found himself at a place known as the "Snake House" the following day. While there he learned that the police were seeking him, and he fled (R. 253). He was apprehended some two weeks later at a railroad section station known as Rainbow, approximately twenty miles from Anchorage. The apprehension was effected by Agents Daniel Bryan and Frederick Frohbose, special agents of the Federal Bureau of Investigation. The appellant had been seen coming down the track approaching Rainbow, and the two agents mentioned concealed themselves by the side of the track and waited for the appellant's arrival near them. When he arrived at a position approximately ten feet from Frohbose, the latter rushed down an incline identifying himself as an F. B. I. agent and ordering Fuller to put his hands up. Then appellant, instead of immediately obeying the order, made some motion as if to strike Frohbose or reach for a gun, whereupon Frohbose struck him twice, once with his gun and once with his fist. The appellant fell to the tracks but immediately got up and raised his hands, and the two agents made a quick search for weapons. They took him down the track to Rainbow and there awaited the arrival of a scooter car from Anchorage, in which they all returned to Anchorage, arriving at approximately 8:30 or 8:45 and immediately went to the office of the Federal Bureau of Investigation. Upon his arrival at the F. B. I. office Fuller was permitted to remove his wet clothing, was given food, cigarettes and received the attention of a doctor. He was also photographed and turned over to the marshal of the federal jail at approximately 1:10 a. m. on the following morning, August 3rd. During the period of time between 8:30 or 8:45 p. m. and 1:10 a. m. the appellant was questioned concerning his participation in the crime, and signed a written statement which was later admitted into evidence (R. 175-180).

ARGUMENT

I

There Was No Error On the Part of the Trial Court in Admitting into Evidence for Consideration By the Jury the Confession Made By Appellant to Agents of the Federal Bureau of Investigation

The mere fact that a confession is made at a time when an accused is in custody will not render a confession otherwise voluntary inadmissible. The admissibility of such a confession is first determined by a preliminary examination of the Court. *State v. Blodgett*, Supreme Court of Oregon, 92 Pac. 820. As set forth in the above case, the inquiry is preliminary to the admission of the evidence and is addressed entirely to the judge. At page 822 of the same opinion we find the following language employed by Judge Slater:

A confession is admissible when voluntarily made to a public officer, even though the prisoner be in custody of such officer, unless the confession be in some sense elicited by threats or promises, and a prisoner's confession will not be rejected as evidence merely because it was made in answer to a question which affirmed his guilt.

Confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession if it appears to have been voluntary and was not obtained by putting the prisoner in fear or by promises. *Sparf v. United States*, 156 U. S. 51. *Wilson v. United States*, 162 U. S. 613. * * *.

The warning given by the district attorney to the prisoner before he addressed any questions to him to the effect that whatever he said would be used against him and that he need not make any statements unless he desired to, overthrows any possible inference of duress that might otherwise be drawn from the form and manner of the questions afterwards put to the prisoner and this fact distinguishes this case from such cases as *Bram v. United States*, 168 U. S. 532 (other cases cited), cited by counsel for defendant in support of his contention.

It will be noted in the case before us that appellant was not abused, no threats were made, and he freely related everything contained in the statement, after having been advised that he did not have to make such a statement and that if he did so, it could be used against him. This admonition is also contained in the written statement itself, which the appellant signed after having read it aloud (R. 180). Appellant admits, himself, that no threats were made to him in the F. B. I. office nor was he abused in any way at that time (R. 195). In *Young et al. v. Territory of Hawaii*, C. C. A. 9th Circuit, 1947, 163 Fed. 2d 490 at page 494, quoting Justice Garrecht:

As we shall see hereafter, the voluntary nature of Miss Nozawa's statement was a matter to be determined preliminarily by the trial judge and ultimately by the trial jury.

And at page 495 Judge Garrecht quotes from the case of *Lyons v. Oklahoma*, 322 U. S. 596, as follows:

The voluntary or involuntary character of a confession is determined by conclusion as to whether the accused at the time he confesses is in possession of 'mental freedom' to confess to or deny a suspected participation in a crime. (Cases cited). * * * But when there is a dispute as to whether the acts which are charged to be coercive actually occur or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the testimony of the witnesses, but the legal duty is upon them to make the decision. (Cases cited).

In *Osborn v. People*, Supreme Court of Colorado, 262 Pac. 892, quoting from Judge Butler's opinion, at page 893:

Whether or not a confession was voluntary is primarily a question for the trial court.

And in *Ah Fook Chang v. United States*, 9th Circuit, 91 Fed. 2d 805, Judge Haney in his opinion, at page 809, stated:

The mother and son both testified that statement was made under threats and compulsion. On the other hand, an inspector of the police, a captain of police, and a Federal narcotic agent all testified to the contrary. Since the credibility of the witnesses is an important element in weighing the evidence, we believe the trial court's judgment thereon must be sustained. We therefore hold there was no error in denying the motion to suppress a statement made by the mother and admitting the same in evidence on the trial.

The record of the case before us reveals that the Court went to considerable length in an effort to determine whether or not the confession of appellant was legally admissible. After having determined that it was admissible, it was submitted for the consideration of the jury under proper instructions. The Court itself even went so far as to engage in questioning witnesses relative to the admissibility of the statement (R. 204). The mere fact that the appellant was in custody, in the absence of threats or promises to induce a confession, will not render it inadmissible. This principle is further supported in *Sykes v. United States*, 143 Fed. 2d. 140:

It was insisted at the argument that the admission into evidence of the statements made by the appellant to the police officer prior to arraignment was contrary to the rule announced by the Supreme Court in the McNabb case. We think there is no merit in the contention.

In the subsequent cases of *United States v. Mitchell* the Supreme Court explained that the rule in the McNabb case did not render inadmissible a voluntary confession obtained during an illegal detention, provided that it was not induced by the illegal detention.

And in the case of *United States v. Ruhl*, 55 Fed. Supp. 641:

A confession voluntarily made is not rendered inadmissible by subsequent illegal detention of accused without taking him before a committing magistrate.

Failure to take accused before a committing magistrate immediately upon his arrest does not render a confession inadmissible. In determining whether a confession is admissible as a matter of law, Court must determine whether reasonable minds might differ in connection with the circumstances under which confession was obtained as to whether it is voluntary or involuntary.

Where a confession appears to be admissible but a question of fact as to whether it was voluntarily or involuntarily made is involved, it must be submitted to the jury with instructions to determine its voluntary or involuntary character as a question of fact, and Court must exclude it from consideration or consider it along with the other evidence depending upon whether the Jury finds it to be voluntary or involuntary. A confession obtained after repeated questioning, over a long period of time and without threats or punishment or any promise of reward was submitted to a Jury along with such evidence of circumstances surrounding the making of confession as government and accused might wish to present, leaving it to the Jury to determine whether confession was voluntarily made and therefore entitled to consideration, though accused was not taken before committing magistrate until almost two months after his arrest.

In *Wheeler v. United States* and *Patton v. United States*, District of Columbia, 165 Fed. 2d 225, Associate Justice Wilbur K. Miller, in his opinion at page 230, stated:

It is true that in holding Patton from 3:00 o'clock Sunday morning until Tuesday without

taking him to the nearest available commissioner, the officers violated Federal Criminal Rule 5(a). Patton relies upon the following cases as showing that on that account he is entitled to reversal: *McNabb v. United States*, 318 U. S. 332; *United States v. Mitchell*, 322 U. S. 65; *White v. Texas*, 310 U. S. 530; *Chambers v. Florida*, 309 U. S. 227; *Ziang San Wan v. United States*, 266 U. S. 1; and *Akow-skey v. United States*, 158 Fed. 2d 649. Those authorities do not help him as the facts of this case render them inapplicable. While the officers acted unlawfully in failing to present Patton to a commissioner more quickly than they did, it does not appear that the delay induced the confession which he made Monday night.

While no serious contention is made that the appellant in this case was illegally detained, some point is made of the fact that he was not immediately taken before the nearest magistrate. The apprehension of appellant was effected on August 3, 1946, which was on a Saturday, and the arrival of the arresting party in Anchorage was at a time after the United States Commissioner's court had suspended for the weekend. While it does not appear in the record, it is logical to assume that appellant was taken before the Commissioner without unnecessary delay on the following Monday. Had this not been true, appellant would certainly have brought this fact out in the trial of the case in connection with the admissibility of the confession. And as matter of fact, the appellant at no time prior to making the confession, asked to be taken before the Commissioner. The latest word of the Supreme Court in connection with the admissibility of confessions is to be found in *United States v. Mitchell*, 322 U. S. 65, in which case the McNabb case is distinguished as related by the opinion of Justice Franklin at page 67.

In the circumstances of the McNabb case we found such an appropriate situation in that the

defendants were illegally detained under aggravated circumstances. One of them was subjected to unremitting questioning by a half dozen police officers for five or six hours, and the other two for two days.

Page 69:

As pointed out in the McNabb case, "The mere fact that a confession was made while in custody of the police does not render it inadmissible.

Page 70:

Here there was no disclosure induced by illegal detention. No evidence was obtained in violation of any legal rights. But instead, the consent to a search of his home, the prompt acknowledgment by the accused of his guilt, and the subsequent ruling apparently of such spontaneous cooperation and confession of guilt.

In a separate opinion by Justice Reed (p. 71), we find the following language:

If confession is freely made without inducement or menace, it is admissible. If otherwise, it is not. For if brought about by false promises or real threats, it has no weight as proper proof of guilt.

It is submitted that the confession in the case before us meets the test laid down by the Supreme Court in the above cited case. As a matter of fact, in practically all of the cases above cited, we find the circumstances claimed to be prejudicial to the defendants much more aggravated than in the present case, if it can be said that any aggravation whatever existed. There is no evidence whatever that any threats or promises were made to appellant at the time the questioned statement was made. However, it is his contention that it was prompted by the fact that he was struck by the arresting officer at the time of his appre-

hension. This particular point has been raised in the case of *Roman v. State*, Supreme Court of Arizona, 201 Pac. 551; *Osborn v. People*, *supra*; *Territory v. Emilio*, Supreme Court of New Mexico, 89 Pac. Rep. 239. In the latter case appellant complained of the admission of an alleged confession by him as to the homicide. At the time of the arrest the appellant was ordered to surrender and he replied that he would not, and the sheriff then ordered the posse to fire at appellant, which was done; that he thought he heard appellant groan and then ordered the posse to cease firing; that appellant then said not to shoot and that he would surrender. The witness then ordered appellant to get up and throw up his hands, which he did, and then when about six yards from witness appellant dropped one of his hands and witness told him to again raise it or he would shoot appellant. Following this encounter several statements were made by defendant which were testified to in court over objections of defendant. Judge Parks in his opinion stated, at page 241:

* * * The fundamental principle upon which confessions have been excluded which are induced by promises or threats, hope or fear, is that under such circumstances the tendency to speak falsely is so great as to render the statement entirely untrustworthy. Wigmore on Evidence, Section 822. Another principle of exclusion is established by the highest court in the land, viz. that that portion of the 5th Amendment to the Constitution of the United States which provides that no person "shall be compelled in any criminal case to be a witness against himself" excludes involuntary confession. *Bram v. United States*, 168 U. S. 532. These two principles or rules of exclusion are widely different in character and effect. Thus, under the former, the object is to exclude statements which are false. Under the latter, the object may be to exclude statements which are true. Wigmore on Evidence, Section 823. But under either of these

rules are the statements objectionable? In the first place, it is to be observed that no solicitation of any kind or character was made on defendant to make a statement, and no promises offered. Then, as soon as he surrendered, and before he had been informed of the cause of his arrest, of his own motion he began to talk and stated he had killed a woman. At the body of the deceased, he was interrogated by one of the posse whether the deceased was the one he had killed, and he said she was. This was but a continuation of a statement begun by defendant without solicitation at the point of arrest, and is not objectionable within the doctrine of the Bram case, because of the interrogation. The defendant was not, therefore, moved to make the statement by any promise which excited hope in his mind of advantage or immunity. Again, no threats of injury of any kind were made. Every act of the officers in making the arrest was entirely legal and proper. They were not intended or designed to extort a statement from the defendant by exciting his fears. If violence attended his arrest, the defendant was alone responsible for the same by his resistance. It does appear that a considerable number of people had gathered near the body of the deceased, but not a single word was uttered by any member of the congregation, and no act was committed, from which a menace or threat could be implied. If fear induced the defendant to speak, it was the fear of the consequence of his crime to be suffered in a legal way, and was not a fear of present danger excited by threats or direct act or acts from which a menace could be reasonably implied. It is true defendant testified he was afraid, and for that reason made the statements, but all the circumstances tended to refute this claim, and the Court so determined, and properly, as we think. Under such circumstances every inducement was offered to deny the crime, and none appeared to admit it. In such case a confession is voluntary. (Cases cited)

In *Roman v. State, supra*, in which case confession of having committed first degree murder was made by defendants after they had been arrested and had been shot after attempting to shoot officers in resisting arrest but before they had been accused of any crime, in response to question—"What have you boys done that makes you so wild?"—held not to have been obtained by threat, coercion or promise. It was stated by the Court:

There was certainly no threat or promise in this question. The desperate resistance to arrest no doubt aroused in the mind of the questioner a suspicion and prompted the question, and whatever may have been the reason that actuated the defendant and Martinez in confessing their connection with the Tempe murders it is not apparent that they did so under any threat, or fear, or hope, or promise.

In the *Osborn* case, *supra*, at page 893:

To make a confession involuntary because of promises or threats, the promises or threats must have induced the confession, and there must be a connection between the promises or threats and confession which must have been caused, prompted, or induced by promises or threats. If promises or threats do not have the influence to induce the confession, the confession must be referred to other motives.

The circumstances of the present case come well within the rule just set forth. No connection whatever is shown between the blows administered to appellant at the time of his apprehension and the confession made by him several hours later. The circumstance of the apprehension cannot be placed in the category of a brutal beating intimated by appellant. It will be remembered that the arresting officers were dealing with a fugitive who had been at large for approxi-

mately two weeks, and it was believed by Agent Frohbose that appellant at the time of arrest was armed. It is true that Mr. Frohbose could have remained in hiding and ordered the appellant to surrender before he approached him. However, in that event, if the appellant had made any motion indicating resistance, in all probability it would have been necessary for the officer to shoot him. Undoubtedly, the agents of the Federal Bureau of Investigation are instructed and trained to make arrests without recourse to such drastic measures. In attempting to make this arrest, rather than rely upon the possibility of having to fire upon appellant, the officer chose to dash down the incline and arrive within striking distance of appellant, depending upon the element of surprise and his ability to physically overcome him in the event of resistance, rather than to resort to the more severe measure. He probably was somewhat excited under the circumstances, and it might possibly be that he misinterpreted appellant's actions in not immediately and properly responding to the demand to raise his hands. And the blows struck by Mr. Frohbose were only those necessary to effect the arrest of one he considered a desperate fugitive. There is no evidence whatever that can be interpreted in any manner as displaying brutality or mistreatment of appellant. To the contrary, upon his arrival at the section house at Rainbow, appellant was offered a sandwich by one of the section hands, which he refused. He was also given a drink of water (R. 289), although the appellant denies these facts. As previously stated, upon his arrival in Anchorage he was afforded an opportunity to remove his wet clothing and was furnished with food and cigarettes, and the services of a doctor were obtained for his comfort and welfare.

Nowhere do we find here a case in which appellant was subjected to what is ordinarily referred to as the

“third degree.” Those present during the interview were Agent Bryan, Chief of Police Johannsen and Mr. Frohbose. Mr. Frohbose and Mr. Johannsen both engaged in questioning the appellant (R. 190). However, no contention is made that the questioning was of such nature as to amount to coercion. It appears from appellant’s opening brief that the principle point upon which he bases his contention that the confession was not free and voluntary is the fact that appellant’s mental and physical condition were such at the time of making the statement that it could not be considered a free and voluntary statement.

The following case deals somewhat with this subject: *Taylor v. State*, Criminal Court of Appeals, Okla., 225 Pac. 988, at page 992:

The rule generally adopted in regard to admissions or confessions made by persons said to be mentally deranged is that the admissibility or voluntary character of the confession is not affected thereby, but the circumstances are to be taken in consideration by the jury in weighing the evidence. A confession under such circumstances should not be rejected merely because it was made under great excitement or mental distress, or fear, where such state of mind was not produced by extraneous pressure exerted for the purpose of forcing a confession, but springs from apprehension due to the situation in which the accused finds herself.

In *Mergmer v. United States*, D. C., 147 Fed. 2d 572, Justice Miller at page 572 makes the following statement:

The drunken condition of an accused when making a confession, unless as such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession but may affect its weight and credibility to the jury.

Skiskowski v. United States, 158 Fed. 2d 177, Associate Justice Clark states, under Syllibus 1 at page 180:

It is not argued that appellant, Skiskowski, was subjected to any physical abuses or torment during periods of interrogation. It was not shown that he was, in fact, physically ill, and the record discloses no evidence from which it can reasonably be inferred that he was mentally exhausted from extended and harrassing questioning period.

And in *Bell v. United States*, D. C., 47 Fed. 2d 438, Chief Justice Martin, in his opinion, at page 439, makes the following statement:

The rule of law seems to be well settled that the drunken condition of accused when making a confession, unless such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession but may affect its weight and credibility with the jury (cases cited). This rule has been applied in many cases. The fact that defendant was more or less intoxicated when he confessed does not exclude the confession if he had sufficient mental capacity to know what he was saying.

Appellant contends that he did not remember reading the statement and that his mind was kind of a blank at times and he did not know exactly what he was signing (R. 193-197). When taken into consideration with his admission of his initials on various corrections in the statement, coupled with the fact that he remembers various other small details at or about the time of making such statement (R. 199) were matters which under the foregoing decisions were for the jury and did not render the statement inadmissible.

In *State v. Henderson*, 184 Pac. 2d 392, there was a similar set of circumstances (p. 403) in which it was testified to by the F. B. I. agent that the defendant read the statements and called attention to several mistakes

that had been made and that some were crossed out and other words added, and they were initialed. Defendant contended that he looked it over but did not read it over. In the foregoing case a judgment of conviction of murder in the first degree was affirmed.

There is no presumption against a confession. *Gray v. United States*, C. C. A., 9th Circuit, 9 Fed. 2d 337, page 339, Judge Gilbert in his opinion states:

It is the rule in the federal courts that the fact that a confession is made by an accused person, even while under arrest, or when drawn out by the questions of an officer, does not necessarily render it involuntary. There is no presumption against a confession and no burden upon the government to establish its voluntary character. *Murphy v. United States*, 285 Fed. 801, 807; *Sparf v. United States*, 156 U. S. 51; and *Perovich v. United States*, 205 U. S. 86, 91.

This same point is made in *Hartzell v. United States*, 72 Fed. 2d 569, in which case certiorari was denied, 298 U. S. 621. At page 577 of that decision Judge Gardner in treating upon this question, says:

In the federal courts there is no presumption against voluntary character of a confession, and the burden is not on the government in first instance to show its voluntary character. Citing *Gray v. United States* 9, Fed. 2d 337; Wigmore on Evidence 2d Edition, Section 860.

However, under this ruling the government in the present case went further than was necessary and did establish the fact that the confession was free and voluntary under the test provided by all of the foregoing decisions. There may have been some minor conflicting testimony as to the voluntary character, but under such circumstances it has been held repeatedly that conflicting evidence should go to the jury. *Lyons v. Oklahoma*, *supra*; *United States v. Ruhl*, *supra*;

Wheeler v. United States, supra; Osborn v. People, supra; Young et al v. Territory of Hawaii, supra; Ah Fook Chang v. United States, supra; Mergmer v. United States, supra.

Justice Roberts in the case of *Lisenba v. California*, 314 U. S. 219, gives a lucid and concise statement as to this question regarding confessions, at page 238:

There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury, which involves an answer to the due process question. In such a case, we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.

Here, judge and jury passed on the question whether the petitioner's confessions were freely and voluntarily made, and the tests applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of due process; this notwithstanding the issue submitted was not *eo nomine* one concerning due process. Furthermore, in passing on the petitioner's claim, the Supreme Court of the State found no violation of the Fourteenth Amendment. Our duty, then, is to determine whether the evidence requires that we set aside the finding of two courts and a jury, and adjudge the admission of the confessions so fundamentally unfair, so contrary to the common concept of orderly liberty, as to amount to a taking of life without due process of law.

And the Court goes on (p. 241) as follows, in speaking of the defendant:

He exhibited a self-possession, a coolness and an acumen throughout his questioning and at his trial, which negatives the view that he had so lost his

freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny or to refuse to answer.

In the present case, there is a fair comparison between that statement and the demeanor of the appellant when testifying on the stand, who, in one or two instances, stated positively, "I am not answering any further questions." (R. 271). And we find him alternating this kind of answer with the answer that he did not remember. It was not necessary in the instant case to cajole, threaten, intimidate or otherwise induce the appellant to make a statement, but on the contrary it appears that the one spark of decency remaining in his character prompted the desire to rid his conscience of the horror of his burden. He told the agent in charge of the Federal Bureau of Investigation, Mr. Teague, upon his arrival at Anchorage following his arrest, that he wanted to get it off his mind. (R. 296). And later, when asked by Mr. Frohbose in the F. B. I. office if he wanted to make a statement, he answered that he did (R. 213). The language used in *State v. Henderson, supra*, by the Court at page 404, quite probably coincides with the facts as they existed here.

* * * * The load of the criminal deeds which a wrongdoer has committed is a heavy one and not infrequently he wants to talk to someone. * * * The trial judge, in ruling upon the admissibility of his purported confessions, had a right to believe that the weight of his load, not compulsion, caused him to speak.

A number of the cases cited by appellant in his opening brief can be distinguished from the present case. In *People v. Loper*, 112 P. 720, cited by appellant, the defendant was cajoled, brow-beaten and persuaded; was called a monumental liar; was told that deceased's

friends would have hanged him to the first tree if sheriff had taken him to the place where the body was found. Then was solitarily confined and confessed the following morning.

In the case of *United States v. Lolardo*, 2d Circuit, E. D., N. Y., 67 Fed. 2d 883, Judge L. Hand, at page 885, states as follows:

The authorities are so many and so varied that we are of necessity confined to those in the Federal courts which alone are authoritative for us. The leading case is *Bram v. United States*, 168 U. S. 532. * * * In spite of the court's treatment of those decisions as a safe-guard * * * we do not believe that it meant to commit itself to the doctrine that the mere hope of a lighter punishment shall exclude a confession.

Then the Court cites and distinguishes the following cases which have been cited by appellant:

Perrygo v. United States, 2 Fed. 2d 181, in which a boy of 17 and of low mentality was examined by four or five policemen for approximately an hour and a half. *Purpura v. United States*, 262 Fed. 473, where the accused was held incommunicado for 24 hours. *Davis v. United States*, 32 Fed. 2d 86, in which case the accused was brought to a morgue where his putative victim lay and was there examined. It can readily be seen that the facts of these cases are distinguished from those in the present case.

An examination of the other cases cited by appellant will also indicate that the facts there are different from the present facts. It is submitted that the facts revealed in the record in the light of the decisions above set forth make it obvious that the Court did not err in admitting the confession of appellant and submitting it to the jury under proper instructions.

II

**The Trial Court Did Not Err in Admitting into Evidence Plaintiff's
Photographic Exhibits I and II**

The photographs complained of as set forth in appellant's opening brief, page 16, were submitted for the purpose of corroborating oral testimony previously given by witnesses as to the severity of the beating administered to the deceased, Jean Mackey, by the appellant. The admissibility of photographs in assisting the jury in their consideration upon any material fact in the case is always admissible. This is true regardless of whether or not such exhibits are of a gruesome nature. This principle of law has been discussed and decided in a number of jurisdictions. *State v. Nelson*, 92 Pac. 2d 182, Supreme Court of Oregon, p. 191.

Although a photograph might be prejudicial because of its so-called gruesome character, it is nevertheless admissible in evidence if material to some issue in the case. *State v. Weston*, 62 Pac. 2d 536; *State v. Weitzel*, 69 Pa. 2d 958; 2 Wigmore on Evidence, Section 1157; *Commonwealth v. Retkovitz*, 110 N. E. 293; *State v. Gaines*, 258 Pac. 508.

The arguments which defendant presents to the effect that State's Exhibit O was improperly admitted because it was a gruesome photograph, find answer in *State v. Weston*, *supra*. In that case the court, speaking by Mr. Justice Rossman, gave a very complete analysis to the law applicable to so-called "Gruesome" exhibits. The opinion and authorities there set forth, it is believed, constitute a clear showing that the court committed no error in the present case in admitting in evidence State's Exhibit O. * * * The rule of law is that exhibits of this character, sometimes known as real evidence, are admissible if they are material as evidence. * * *

State's Exhibit O was material in the present case to prove the exact nature and manner in which death was caused to the deceased by the bullet

wound inflicted by defendant. It was material for the purpose in exactly the same way that the testimony of the physicians who performed the autopsy was admissible. * * * There is no doubt that the photograph is clearer and more understandable evidence than oral testimony. That it was cumulative does not affect its materiality.

In *State v. Weston et al.*, 64 Pac. 2d 536, Supreme Court of Ore., cited in the foregoing opinion we find a further expression of this matter at page 543:

From the above authorities we deduce the rule that maps, photographs, et cetera containing markings are not inadmissible if they are otherwise relevant and if the individual who made the mark or wrote the legend was familiar with the facts and so testifies. * * *

Defendant's third contention submits that the cast was a gruesome object, prejudicial to him, and that it was therefore inadmissible. The rule that pertains to the problem of prejudice arising from the exhibition to the jury of wounds, et cetera, is thus stated in Section 1157 Wigmore on Evidence, 2d Edition: "The autoptic preference to the jury of the weapons or tools of the crime, or of the clothing or the mutilated members of the victim of the crime, has often been objected to on ground of Undue Prejudice. * * *

Page 544:

* * * but it is to be doubted whether the necessity of thus demonstrating the method and results of the crime should give way to this possibility of undue prejudice. * * * But, in the vast majority of instances where such objection is made, it is frivolous, and there is no ground for apprehension. Accordingly, such objections have almost invariably been repudiated by the courts.

In murder cases objects much more prejudicial to the defendant than a plaster cast have frequently been held admissible in evidence. In

Savary v. State, 87 N. W. 34, 35, the Court held that the skull of the deceased and a photograph thereof was properly admitted. * * * In *State v. Mariano*, 91 Atlantic 21, 26, the decision stated. "In this case the manner of the killing was a matter of inference. The fractured bones served to demonstrate the destructive force and effect of the blows inflicted better than a technical verbal description and gave the jury opportunity as practical men to judge for themselves whether the injuries were likely to follow from a stone or similar weapon as described by the medical witnesses." * * *

In murder cases photographs showing the wounds upon the body of the deceased have frequently been held admissible, even though the pictures were repulsive and would therefore adversely affect the interests of the defendant. In *State v. Casey*, 213 Pac. 771, 217 Pac. 672, enlarged photographs of the deceased's wounds were held admissible. In *State v. Gaines*, 258 Pac. 508, the Court sustained the admissibility of a portion of the skull of the deceased and the photograph of the head of the deceased showing injury. In *Commonwealth v. Retkovitz*, 110 N. E. 293, 294, the court declared: "The photographs of neck and face of the dead woman, Domka Peremebida, for the murder of whom the defendant was on trial, rightly were admitted in evidence. * * * Natural abhorrence of a crime such as that charged in the indictment was an inevitable incident of the trial. Competent and material evidence is not to be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible." In *State v. Miller*, 161 Atlantic 222, 224, the court sustained the admissibility of photographs which showed not only the bullet wounds on the body of the deceased but also his entire body. We quote from the decision: "It was argued that the photographs would cause a feeling of repulsion and would prejudice the minds of the jury against the defendant. It is not contended that the photographs were not gen-

erally correct. They were competent to prove the nature of the wounds, the identity and the cause of death of the deceased." In *State v. Burrell*, 170 Atlantic 843, 846, the Court held that no error was committed in the reception of two photographs of the body of the decedent which were offered to show marks and bruises on her throat, in support of the State's theory that the woman had been choked to death by a man's hand. We quote from the decision: "The argument against the admission of the photographs is that they served 'to prejudice the mind of the jury against the defendant.' That contention, if true in point of fact, is ill founded in point of law. * * * Assuming that they tended to prejudice the mind of the jury, that does not render their admission illegal. They tended to prove a material fact, without which the State would be unable to support the charge laid in the indictment." Also citing *Commonwealth v. Winter*, 137 Atlantic 261, 263; 2 Wigmore on Evidence, Section 792; *Commonwealth v. Sydlosky*, 158 Atlantic 152.

In *State v. Eggleston*, 297 Pac. 162, Supreme Court of Washington, the court held:

Appellant next claims that the Court erred in admitting in evidence State's Exhibit A, being a photograph showing the effect of the gunshot wound on the body of Walter Engstrom. With this we cannot agree.

State v. Cunningham, 144 Pac. 2d 303, Supreme Court of Oregon, page 311:

The defendant does not claim that the photograph of the coat is inaccurate or fails to faithfully portray the coat's condition. It will be recalled that Dr. Beeman made the infrared photograph of the coat because photographs of that kind show spots on dark material which would otherwise be difficult of detection. Both the photograph and the coat are before us as exhibits.

It is a matter of almost daily observation that photographs, timely made, can help materially in getting at the facts of a case, and it would be nothing less than folly for the courts in their quest for the truth to disregard the help which any science offers. We have mentioned the defendant's single objection to the introduction of the photograph: "The jury can see that coat as well as a photograph, and understand it just as well." We are satisfied that the objection is based upon a misconception of what the infrared photograph reveals". It was properly overruled.

A case involving an extreme set of facts is that of *State v. Smith*, 83 Pac. 2d 749, Supreme Court of Washington. In the above case, as in the present, death was a result of a beating administered by the defendant. The body of the deceased was exhumed four months after burial and a second autopsy held, at which time several photographs of the body were taken. One showing the head of the deceased was admitted over appellant's objection. Page 753:

Appellant vigorously argues that the admission of this photograph in evidence constitutes reversible error in that the photograph did not show conditions as they existed at the time of death or shortly thereafter and that the photograph did not throw any light on the cause of Carlson's death and tended to prejudice the jury against appellant. (Court cited *State v. Gaines*, 258 Pac. 508, and quoted from that case as follows: "We cannot say that it was not necessary in proof of any material fact in the case. The fact, if it be a fact that it was calculated to prejudice or influence the minds of the jury would not be a sufficient objection to its admission if it was otherwise competent.")

In 2 Wharton's *Criminal Evidence*, 11th Edition, page 1319, Section 773, the rule is laid down as follows: "* * * Photographs showing the wounds of a deceased person are admissible although they did not show or purport to show all

of the wounds received which resulted from the commission of the homicide charged. Admissibility of photographs does not depend upon whether the objects they portray could be described in words, but rather on whether it would be useful to enable the witness better to describe and the jury better to understand the testimony concerned. Where they are otherwise properly admitted, it is not a valid objection to the admissibility of photographs that they tend to prejudice the jury. Competent and material evidence should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible. In the case at bar, appellant was strenuously insisting that the blows which he struck were in self defense. The question of appellant's guilt or innocence largely turned upon the degree of force which he used in the fight which resulted in Carlson's death. In this connection, the testimony of competent surgeons who examined Carlson's body was of considerable importance. * * * The State had the right to show that Carlson received wounds other than that which caused his death. Necessarily, a broad discretion must be allowed to the trial court in ruling upon such questions.

In *State v. Henderson*, Supreme Court of Oregon, *supra*, at page 408, the Court states:

Photography has achieved such a high degree of excellence that in some instances it surpasses the spoken word as a means of portraying facts. Normally, photographs, when verified by required preliminary proof, are admissible in evidence: *State v. Casey*, 108 Or. 386, 213 P. 771, 217 P. 632. In the present instance, the photographs, according to our belief, show more clearly than the testimony of Dr. Sneed that the wound in the back is the place where the bullet entered and the one in the chest the place where the bullet left. The conclusion appears to be inescapable that the photographs were material and essential to the State.

The photographs, showing, as they do, wounds upon a dead man's body, are not pleasant to view. Bloodstained clothing, no one likes to touch. Yet there is nothing about these five objects which is peculiarly abhorrent or gruesome. The trial of a murder case is something which everyone prefers to avoid. The jurors in a case such as this realize the solemnity and the disagreeable nature of the duty which they are called upon to perform. Photographs which have appeared in the daily press during the war period showing the victims of atrocious misdeeds have steeled virtually everyone to gruesome sights.

In *State v. Nelson*, 162 Or. 430, 92 P. 2d. 182, 191, this court said:

‘Although a photograph might be prejudicial because of its so-called gruesome character, it is nevertheless admissible in evidence if material to some issue in the case. *State v. Weston*, 155 Or. 556, 64 P. 2d 536, 108 A. L. R. 1402; *State v. Weitzel*, 157 Or. 334, 69 P. 2d 958, 2 Wigmore on Evidence, Sec. 1157; *Commonwealth v. Retkovitz*, 222 Mass. 245, 110 N. E. 293; *State v. Gaines*, 144 Wash. 446, 258 P. 508. A photograph of a dead body is properly admitted when it is material for the sole purpose of explaining and demonstrating the testimony of expert medical witnesses. *State v. Weston*, *supra*; *State v. Clark*, 99 Or. 629; 196 P. 360; *Commonwealth v. Winter*, 289 Pa. 284; 137 A. 261; *Carnine v. Tibbetts*, 158 Or. 21, 74 P. 2d 974. The photograph described in State's Exhibit O is not gruesome or prejudicial. *State v. Weston*, *supra*; *State v. Clark*, *supra*. *State v. Miller*, 43 Or. 325, 74 P. 658, cited by defendant, has been distinguished and is not in harmony with *State v. Weston*, *supra*. See, also, *State v. Finch*, 54 Or. 482, 103 P. 505, and *State v. Clark*, *supra*, where the case of *State v. Miller*, *supra*, is distinguished.’

Evidence may always be introduced to show the nature, character and extent of the injuries sustained as

indicative of the intent with which they were inflicted. 6 C. J. S. Section 116, page 980. *People v. Manning*, 320 Ill. App. 143, 50 N. E. 2d 118. *State v. Compton*, 31 S. D. 430, 205 N. W. 31.

In the Manning case the Court stated as follows:

The injuries following the blow, while not strictly a part of the offense, shed light upon the result of assault with a truck crank handle and afford a fair estimate of the deadliness of the instrument as well as the quality of the intention. These reasons justify the rule, and the defendant here, judging from the record, was not prejudiced. Since the testimony is admissible, we see no objection to the doctor testifying in addition to Caputo to the injuries received. The doctor was better qualified to do so.

If a photograph can throw light on the subject of inquiry more clearly than oral testimony could, it may be properly admitted, and it is largely a question of discretion with the trial court. *Madden v. United States*, C. C. A., California, 20 Fed. 2d 289. *Vili Birghi v. State*, 43 Pac. 2d 210. *People v. Shaver*, 61 Pac. 2d 1170. *State v. Walsh*, 232 Pac. 194. *State v. Williams*, 257 Pac. 619, 23 C. J. S. Sec. 852, page 51, 52.

Plaintiff's Exhibits I and II in this instance, which were photographs of the body of the deceased, shortly after the crime was committed, indicate the nature and extent of the assault which brought about her death. The jury, as the triers of fact, had a right to determine the extent of the beating in connection with the question of purpose and malice which will be discussed more fully hereafter. The mute evidence of the brutality of the assault committed by appellant, as indicated in the photographs, while not a pleasant sight to behold, nevertheless under the foregoing decisions, were not inadmissible on that ground. Certainly, the photographs could not inflame the jury more than the brutal acts of appellant himself.

III

The Trial Court Did Not Err in Refusing to Instruct the Jury to Find the Appellant Not Guilty of Murder in the Second Degree on the Grounds that the Offense Charged Did Not Have Sufficient Evidence to Submit It to the Jury in Justifying a Verdict of Murder in the Second Degree

There is no question but what malice is a necessary ingredient in the crime of second degree murder under Section 4759, Compiled Laws of Alaska, 1933. But as has been stated both by text writers and in opinions from practically every jurisdiction, malice and intent may be inferred from circumstances and such inference is to be drawn if at all by the jury, who are the triers of the fact, under proper instructions from the Court. The Supreme Court has also expressed its opinion upon this question. In *Hopt v. People*, 104 U. S. 631, it is stated by Mr. Justice Gray in the Court's opinion:

The degree of the offense depends entirely upon the question whether the killing was wilful, deliberate and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication, if such there be, not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime. * * *

* * * But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury.

In *Tucker v. United States*, 151 U. S. 164, page 166:

In statement of the case the following instruction was given by the Court. "You are not to excuse him to the extent of mitigating his crime because he was drunk unless he was in that condition where he was incapable of forming an intent, where he was incapable of coming to a conclusion, and it does not mean alone incapable of forming a specific intent to kill but it means incapable of forming a specific intent to do an act that may kill, that goes so far as to reduce the grade of the crime. If he could not form a specific intent to do the act he did do, then that would reduce the grade of the crime because of drunkenness. The defendant requested the Court to instruct the jury that if they believed from the evidence 'that the defendant was at the time of the killing of Lula May, drunk and that before becoming drunk he entertained no malice towards her and had no intention to take her life and that his intoxication was so deep as to render the formation of any specific intent to take life impossible on his part, he could not be convicted of murder.' "

The Court upheld the lower court's refusal to give the instructions requested by the defendant.

In *Sparf & Hanson v. United States*, 156 U. S. 51, we find the following language employed by Mr. Justice Harlan, at page 59:

Quoting from instruction given by the lower court: "Malice, then, is an element in the offense and discriminates it from the other crime of felonious homicide which I have mentioned, to wit, manslaughter. That is, malice, express or implied, discriminates murder from the offense of manslaughter. Express malice exists when one, by deliberate premeditation and design formed with view to kill or to do bodily harm, the premeditation and design being implied from external circumstances capable of proof, such as lying in wait, antecedent threats and concerted schemes

against the victim. Implied malice is an inference of the law from any deliberate and cruel act committed by one person against another. The two kinds of malice, therefore, to repeat, indicate but one state of mind established in different ways, the one by circumstances showing premeditation of the homicide, the other by an inference of the law from the act committed. That is, malice is inferred when one kills another without provocation or when the provocation is not great. Manslaughter is the unlawful killing of a human being without malice, either express or implied."

The Supreme Court in this case upheld the instructions just given. The above cited case also goes into a lengthy discussion involving the principle of the division between responsibilities of the Court to determine questions of law and of the jury to determine questions of fact.

Stevenson v. United States, 162 U. S. 313, at page 320, Mr. Justice Peckham:

The proof of homicide as necessarily involving malice must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of the killing is to infer it from the surrounding facts, and that inference is one of fact for the jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter.

Page 323

A judge may be entirely satisfied from the whole evidence in the case that the person doing the

killing was actuated by malice, that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice, and yet if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was and to say whether the crime was murder or manslaughter.

It is contended by appellant that if a dangerous weapon had been used, the presumption would be that the defendant intended the natural consequences of his act, and he admits that it is possible for that kind of malice to exist without the use of a dangerous weapon and suggests that even blows with the human fists or feet would indicate malice if long enough continued. (Ap. Op.Br. 21) That statement is supported by cases similar to the case before us. In *State v. Rees*, 107 Pac. 893, Supreme Court of Montana, it is stated:

The charging part of the information in this case is summarized by the defendant's counsel in their brief that he beat and bruised, assaulted Sarah Rees, violently threw her to the ground, pulled her around by the hair of her head and otherwise committed grievous assaults upon her person until she became unconscious, that he then permitted her to lie on the ground exposed to the frost and inclemency of the weather, and neglected and refused to provide her with necessary clothing, shelter and protection, by reason of which assault and exposure Sarah Rees died.

Page 894.

It is contended that the testimony is insufficient to justify the verdict. It would serve no useful purpose to quote it all or any considerable portion of it. It tended to show that both the defendant and deceased were addicted to the use of intoxicants frequently to excess. Both had been drink-

ing before their arrival. They continued to drink and carouse until the morning of December 6, when the defendant appeared at the house of one of his neighbors with the information that his wife was dead. * * * We think the testimony, while at times more strongly to prove the crime of manslaughter than that of murder, was still sufficient to warrant the jury in finding the defendant guilty of murder in the second degree which they did. If they disbelieved the testimony of the defendant, they may have been of the opinion that the circumstances attending the killing showed an abandoned and malignant heart.

People v. Murphy, 32 Pac. 2d 635, Supreme Court of California. Opinion of Chief Justice Waste: page 636:

The evidence is conclusive that the defendant died as a result of injuries inflicted upon her by the defendant while administering to her a severe and apparently unprovoked beating. * * * At the conclusion of the prosecution's case, the defendant took the stand in his own defense. He testified that during the day on which the homicide was committed, he had purchased and consumed approximately three bottles of bitters possessing an alcoholic content in excess of 50 percent by volume, that he remembered being in the apartment with his wife, the decedent, during the early part of the fatal evening; that the next thing he remembered was that he found himself wandering aimlessly along an ocean pier; that he concluded he must have hurt the decedent; that he returned home and found his wife suffering from the effects of the beating imposed; that he begged her forgiveness and undertook to make her comfortable during the remainder of the night; that as he left the next morning the owner of the apartment told him the police were seeking him; that subsequently upon learning of his wife's death he left the city and state. As already indicated, he suc-

cessfully avoided apprehension for several years. Defendant called no other witnesses.

Page 637

Of course whenever the existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the trier of the facts in determining whether such purpose, motive or intent actuated the accused in the perpetration of the offense, may properly take into consideration the fact that he was intoxicated at the time. (Authorities, supra). However, the weight to be accorded to evidence of intoxication and whether such intoxication precluded the accused from forming a specific intent to kill and murder, which intent is a necessary element in murder of the first degree, are matters essentially for the determination of the trier of the facts. (Cases cited). From an examination of the entire record we cannot see that defendant, by reason of the use of intoxicants, was so disordered mentally at the time of the attack on the decedent as to preclude the resultant killing from being of that wilful, deliberate and premeditated character designated in Section 189 of the Penal Code as murder in the first degree. It is significant that defendant, when on the stand, testified in detail as to what transpired immediately before and immediately subsequent to the wrongful assault on the decedent. As to these events his recollection was reasonably vivid. His memory was faulty only as to the period during which the fatal injuries were being inflicted. In view of this, the trial court might very properly discount or reject defendant's testimony as to the extent of his intoxication and conclude that defendant was not so inebriated as to be unable to appreciate the character and gravity of his deliberate and wrongful acts.

People v. Odom, 164 Pac. 2d 68, District Court of Appeals, Calif. In this case the defendant was convicted

of murder in the second degree, which conviction was affirmed. This case was based on circumstantial evidence brought out by witnesses who had heard arguing and fighting next door and heard a woman scream and holler, and the following morning noticed spot of blood on the sidewalk near defendant's residence, and upon entering saw deceased lying on bed with hands lying across one another, dead. Scar under left eye and dry blood around nose. Red seam appearing to be blood on the south wall, and bruises on both eyes and on the forehead just above left eye. At page 69 the Court states:

From the foregoing testimony pursuant to the rule of law set forth above, the jury was justified in finding that death came to the deceased as a result of a beating administered by defendant. It would serve no useful purpose to discuss the testimony of the defendant in which he denied having struck the deceased.

People v. Collins, 5 N. W. Rep. 2d 556, Supreme Court of Michigan. In the foregoing case the defendant was convicted of murder in the second degree based on a death by beating after considerable drinking. The Justice Boyles, in affirming the conviction, rendered the following opinion. Page 562:

Defendant claims the Court erred in failing to take from the consideration of the jury the charges of murder in the first degree and murder in the second degree as requested, and in refusing to submit the case to the jury solely as a charge of manslaughter. The record before us, including defendant's own testimony and admissions, justified the Court in submitting to the jury the question whether the killing was wilful, deliberate, premeditated or malicious. In *Weller v. People*, 30 Mich 16, the defendant was convicted of murder by kicking the deceased along the floor after she had fallen or been knocked down. There was no

proof tending to show the use of a weapon. The issue was whether death resulted from a blow of the defendant's fists, the kick, or by accident. The Court said, "In determining whether a person who has killed another without meaning to kill him is guilty of murder or manslaughter, the nature and extent of the injury or wrong which was actually intended, must usually be of controlling importance.

"It is not necessary in all cases that one held for murder must have intended to take the life of the person he slays by his wrongful act. It is not always necessary that he must have intended a personal injury to such person. But it is necessary that the intent with which he acted shall be equivalent in legal character to a criminal purpose aimed against life. * * *

"The jury were sufficiently and rightly charged upon the extent of the respondent's liability for any intended killing. And if respondent wilfully and violently kicked the deceased in such a way as he must have known would endanger her life, and her life was destroyed in that way, an actual intention of killing would not be necessary, as in such case the death would have been a result he might fairly be held to regard as likely."

It was the province of the jury, and not of the court, to decide whether there was much or little testimony which would reduce the crime from murder to manslaughter. While there may be little testimony to reduce the crime to manslaughter, it was for the jury to measure the quantity of proof.

I also instruct you, members of the jury, in the case of an offense such as the one charged, committed during a period of intoxication, the law presumes the defendant to have intended the obscuration and perversion of his faculties, which followed his voluntary intoxication. He must be held to have purposely blinded his moral perception and set his will free from the control or reason, to have suppressed the guards and invited the mutiny, and should therefore be held responsible as well for the

vicious excesses of the will thus set free as for the acts done by its prompting. In other words, it is well settled law in this State that voluntary drunkenness is not a defense to crime. A man who puts himself in a position to have no control over his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited and, when real, is so often resorted to as a means of nerving a person up to the commission of some deliberate act, and, withal, is so inexcusable in itself, that the law has never recognized it as an excuse for crime.

* * * still, in a case of this kind if there is evidence introduced that the defendant was intoxicated at the time it is alleged he committed the crime, it should be considered by you for the purpose of determining whether the accused at the time of the alleged killing was capable of forming a wilful, deliberate and premeditative purpose to take life. And, as in this case, although you believe from the evidence, beyond a reasonable doubt, that the defendant killed the deceased in manner and form as charged in the information, still, if you further believe from the evidence that at the time he inflicted the fatal injuries he was so deeply intoxicated as to be incapable of forming in his mind a design deliberately and premeditatedly to do the killing, or if you entertain a reasonable doubt as to these things, then such killing would be only at most murder in the second degree or manslaughter.

This has heretofore had the approval of this Court and was proper under the facts and circumstances of this case.

In *State v. Smith*, 83 Pac. 2d 749, Supreme Court of Washington, Justice Beals rendered the following opinion, at page 754:

In 13 R. C. L. Title Homicide, p. 745, appears the following: "The fists may not, indeed, be regarded generally as a deadly weapon, but they become most deadly by blows often repeated, long continued and

applied to vital and delicate parts of the body of a defenseless, unresisting man on the ground.”

The question that malice can be inferred from circumstances was also determined in the case of *Wuichet v. United States*, 8 Fed. 2d 561, C. C. A. 6th Circuit. In this case it was insisted by the defendant that there was no evidence of any purpose on defendant's part to defraud the purchaser of the stock or fraudulently to obtain money from them. He was convicted of using the mails to defraud, and in affirming such conviction Judge Moorman, at page 562 of the opinion, stated:

It is enough to say that the evidence as a whole justified the finding of an underlying intent to defraud. That this element of an offense may be implied from established facts is beyond dispute.

There is certainly ample evidence in the present case from which the jury could infer malice and wilfulness on the part of the appellant, when considered in the light of testimony by Dr. Walkowski as to the badly beaten condition of the body and that the base of the skull was fractured and that it would take considerable force to cause the injury that he discovered (R. 39-41); the testimony of Lydia Savok, an eye witness to the assault (R. 138-149); testimony of eye witness Ted Bruckbauer, who also testified as to the brutal manner of the beating, at one point stating that the severity of the blows could be heard through a closed window (R. 162-170); plaintiff's Exhibits 1 and 2 being the photographs indicating the extent of the wounds and bruises; and the statement signed by Fuller and admitted as Exhibit 13 (R. 328-330).

Legal malice was defined in the case of *People v. Howard*, 295 Pac. 333, Supreme Court of California. Chief Justice Waste, in his opinion, at page 336, states as follows:

The defendant contends that the evidence does not warrant a verdict of first-degree murder because of the asserted absence of a showing of express malice. Murder is defined as the unlawful killing of a human-being with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature, and implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart. * * * When the killing is proved to have been committed by the defendant and nothing further is shown, the presumption of law is that it was malicious and an act of murder, but in such a case the verdict should be murder of the second degree and not murder of the first degree.

We also find in *State v. Henderson*, 184 Pac. 2d 392, Supreme Court of Oregon, an expression by the Court at page 412:

Malice need not be proved by direct evidence. It may be inferred from circumstances.

And at page 413:

We do not believe that error was committed when the requested instruction was refused. In language to which the defendant takes no exception, the trial judge defined the various elements of homicide and added, "Whenever, as in this case, the actual existence of any particular motive, purpose or intent is a necessary element to constitute any particular species or degree of crime, you, the jury, may take into consideration the fact that defendant was intoxicated at the time, if you so find, in determining the purpose, motive or intent with which he committed the act. This assignment of error is without merit.

And in *United States v. Edmonds*, 63 Fed. Supp. 968, Dist. of Columbia, Justice Holtzoff in his opinion, at page 970, stated as follows:

A killing under the influence of passion, induced by insufficient provocation, may be murder in the second degree, and an accidental or unintentional killing constitutes murder in the second degree if it is accompanied by malice. Legal malice does not necessarily mean a malicious or malevolent purpose or personal hatred or hostility toward the deceased. It is a state of mind which shows a heart unmindful of social duty and fatally bent on mischief, or which prompts a person to do an injurious act wilfully to the injury of another. *Liggins v. United States*, 297 Fed. 881.

Malice is further defined in the case of *United States v. King*, 34 Fed. Reporter, 302, Circuit Court, Eastern District N. Y., by Judge Lacombe at page 310:

Malice, you will remember I told you, was the intention to do bodily harm, a formed design to do mischief. It has also been defined as a deliberate intent to kill. It does not necessarily import any especial malevolence toward the individual slain but also includes the case of a generally depraved, wicked and malicious spirit, a heart regardless of social duty and deliberately bent on mischief. It imports premeditation. Therefore, there must logically be a period of prior consideration, but as to the duration of that period no limit can be arbitrarily assigned.

There is never presented to a jury direct evidence of what was the intent of the man's heart at the time. He is the only possible direct witness to that, and if he meant so to testify, he would plead guilty. The existence or non-existence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the process of the mind, are to us or to any one outside of the individual exhibited by the acts which the individual performs, and we are entitled to infer what

his intent was, what were the processes of his mind and the feelings of his heart by a careful study of the acts which he performed and of the other external indications which he may have given of what his state of mind and heart was.

Malice is to be inferred from *all* the facts in the case. If malice is found it must be drawn as an inference from everything that is proved, taken together and considered as a whole. Every fact, no matter how small, every circumstance, no matter how trivial, which bears upon the question of malice, must be considered by the jury at the same time that they consider the use of the deadly weapon, and it is only as a conclusion from all those facts and circumstances that malice, if inferred at all, is to be inferred.

Intoxication is no excuse for crime. A man cannot commit a crime and then say he was intoxicated and claim to go unwhipped of his offense. There is no excuse whatever for the commission of crime, but when shown it may do one of two things. It may sometimes bring murder down to the grade of manslaughter and it may sometimes bring apparent self-defense up to the grade of manslaughter. The court of appeals in this state has thus laid down the rule, "It has never yet been held that the crime of murder can be reduced to manslaughter by showing that the perpetrator was drunk when the same offense, if committed by a sober man, would be murder, but if by reason of intoxication the defendant was so far deprived of his senses as to be incapable of entertaining a purpose or acting from design, then he might not be guilty of murder but be guilty of manslaughter." And the same rule is thus stated by a very eminent text writer, "Where the question of specific intent is essential to the commission of a crime (and I have already charged you that malice, which is intent, is necessary to the crime of murder) the fact that an offender was drunk when he did the act which being coupled with that intention would constitute the crime, should be taken into account by the jury in deciding whether he had that intention.

And in *Nestlerode v. United States*, 112 Fed. 2d 56, Court of Appeals, District of Columbia, by Chief Justice Groner, at page 59:

The court instructed the jury that murder in the second degree is the unlawful killing of another where there is not a premeditated design and plan to effect death but where there is malice aforethought, and the court defined malice aforethought to comprehend an act done regardless of social duty and a mind bent upon mischief—an act of a generally depraved, wicked and malicious spirit—an act done with a depraved mind and attended with circumstances which indicate a wilful disregard of the rights or the safety of others. We can find no proper ground of criticism of the language in which the instruction is couched nor with the fact that the court submitted the case to the jury on that charge. * * * If there are mitigating circumstances, we have failed to find them. What happened is what might have been expected as a result of the events which appellant set in operation and is the natural and probable consequence of these acts. Malice is presumed under such conditions. (Citing *Liggins v. United States*, 297 Fed. 881. *Sabins v. United States*, 40 App. D. C. 440, 443.)

In the recent case of *Bishop v. United States*, 107 Fed. 2d 297, 301, we stated the circumstances under which voluntary intoxication will reduce the degree of the offense from murder in the first to murder in the second degree, but we said that defendant's voluntary intoxication would not, of itself, negative the malice required to constitute second degree murder and thereby reduce second degree murder to voluntary manslaughter. This is the correct and generally accepted rule. (Citing *State v. Trapp*, 109 Pac. 1094, among other cases)

The result of appellant's acts was to bring to their deaths a woman and a man. It would be a sad reflection on justice and a menace to society to hold that because he had chosen to get stupidly drunk, he should escape the punishment of the law.

As will be noted from the foregoing opinions, intoxication is no defense to a crime and is to be considered by the jury as to what effect intoxication, if any, had upon the question of intent or malice. In *People v. Lami*, 36 Pac. Reporter 2d 192, Supreme Court of California, Chief Justice Waste stated, at page 193:

The weight to be accorded to evidence of intoxication and whether such intoxication precluded the accused from forming a specific intention to kill and murder, which intent is a necessary element in murder in the first degree, are matters essentially for the determination of the trier of the facts. *People v. Murphy*, 32 Pac. 2d 635.

And in *State v. Weaver*, 58 Pac. 109, Supreme Court of Oregon, Judge Bean in his opinion, at page 110, states:

The fact of being drunk or mental excitement or ungovernable rage which may be engendered by drinking intoxicating liquors will not reduce the crime of voluntary killing below the grade of murder. It is only when the actual existence of some particular motive, purpose or intent is a necessary element in the crime charged that the intoxication of the defendant becomes important, and not when the essential ingredients of the crime are implied by law from the manner of its commission. It was therefore perfectly proper to instruct the jury in the case at bar that upon the question as to whether the killing was done with deliberation or premeditation, the intoxication of the defendant could be considered in connection with all the other facts in the case. Nor was it error to refuse to instruct them that it might be sufficient to reduce the crime to manslaughter.

State v. Trapp, 109 Pac. 1094, Supreme Court of Oregon, at page 1096, Judge Eakin in his opinion states:

So that the fact alone that one is intoxicated is not a defense for crime except that it may be taken into consideration in determining the purpose,

motive or intent with which the act was done. Otherwise, it is unavailing unless it results in delirium tremens or other form of insanity.

Other cases dealing with the question of intoxication in connection with the crime of murder are *State v. Wallace*, 131 Pac. 2d 222, Supreme Court of Oregon; *Smith v. United States*, 269 Fed. 860, Dist. of Columbia; *Bishop v. United States*, 107 Fed. 2d 297, Dist. of Columbia.

Not only was the Court justified in refusing to instruct the jury to find the defendant not guilty of murder in the second degree, but under the circumstances and the authorities above cited, it would have been highly improper for the Court to give such an instruction, for it would have been removing from the consideration of the jury, as triers of the facts, a function which was within their province. The jury had a right to consider from all of the evidence whether or not the appellant was so intoxicated as to make him incapable of forming any intent or to entertain the malice necessary to the offense charged. The fact that they did not consider that the appellant was intoxicated to that extent was reflected in their verdict. And in reviewing the case in the light most favorable to the government, it becomes immediately apparent that the verdict was justified. That the instructions covering the various phases of the elements of the crime and the intoxication of the appellant were fair and thorough is strengthened by the fact that no exceptions were taken by the appellant, nor did he submit any requested instructions, although it is indicated in the Designation of Record by attorneys for appellant (R. 321).

CONCLUSION

The appellant had a fair and impartial trial and was ably represented by two attorneys. The trial court at every point in the proceedings was mindful of the appellant's rights. No legitimate reason exists for upsetting the verdict of the jury, and it is respectfully submitted that the judgment of conviction should be affirmed.

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No. 11619

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOSEPH PITTA,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California.
Southern Division

No. 11619

United States
Circuit Court of Appeals
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JOSEPH PITTA,

Appellant,

vs.

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Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Appeal:	
Appellant's Designation of Contents of Record on.....	41
Certificate of Clerk to Transcript of Rec- ord on	42
Designation of Portions of Records Deemed Necessary for Consideration on.....	166
Notice of.....	39
Statement of Points on.....	163
Appellants Designation of Contents of Record on Appeal	41
Certificate of Clerk to Transcript of Record on Appeal	42
Defendant Joseph Pitta's Plea of Not Guilty Entered	34
Designation of Portions of Records Deemed Necessary for Consideration on Appeal.....	166
Indictment	2
Judgment and Commitment.....	37
Names and Addresses of Attorneys.....	1
Notice 5/6/47.....	41
Notice of Appeal.....	39

INDEX	PAGE
Order Granting Motions for Severance of Trial, and Trial of Defendant Joe Pitta.....	34
Reporter's Transcript.....	43
Statement of Docket Entries.....	40
Statement of Points on Appeal and Designa- tion of Parts of Records Necessary for the consideration Thereof	163
Statement of Points on Appeal.....	163
Stipulation Dispensing with Printing of Orig- inal Exhibits	166
Verdict	36
Witnesses, Government:	
Briscoe, Elmer A.	
—direct	107
—cross	108
Grady, William H.	
—direct	92
—cross	96
McGuire, Thomas E.	
—direct	51
—cross	65
Mallory, G. E.	
—direct	49
—cross	51

INDEX

PAGE

Witnesses, Defendant:

Bruno, Nino

—direct	120
—cross	124
—redirect	130, 133
—recross	131

Gibbs, Robert

—direct	135
---------------	-----

Gubin, Irving

—direct	137
—cross	148
—redirect	149

Pitta, Joseph

—direct	151
—cross	152



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Jury Trial before the

Honorable Louis E. Goodman, District Judge.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 30449-G

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VINCENT BRUNO, FRANK FLIER, SALVA-
TORE BILLECI, RENALDO FERRARI,
RICHARD BENSON, MIKE J. BILLECI,
JOHN CHRISTOPHER, JOHN ORMAN
KNIGHT, JOSEPH PITTA, SAMUEL
LOUIS COHEN, STANLEY PALIWODA,
HENRY GOURDIN, MILLARD DAVIS,
PAUL CRIVELLO, JOHN TERNULLO,
HARRY FISHER, and FRANK ARRIOLA,
Defendants.

INDICTMENT

First Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury charges: That Vincent Bruno and Renaldo Ferrari, on or about the 5th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approxi-

mately one dram of heroin, and the said heroin had been imported [2*] into the United States of America contrary to law, as said defendants then and there knew.

Second Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Salvatore Billeci, on or about the 5th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Third Count

(Harrison Narcotic Act, 26 U.S.C., Secs. 2553 and 2557)

The Grand Jury further charges: That Frank Flier, on or about the 6th day of January, 1946, in the City and County of San Francisco, State of California, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity par-

* Page numbering appearing at foot of page of original certified Transcript of Record.

ticularly described as one bindle containing approximately one dram of heroin.

Fourth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Millard Davis, on or about the 6th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported [3] into the United States of America contrary to law, as said defendant then and there knew.

Fifth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Salvatore Billeci and Millard Davis on or about the 6th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Sixth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and Salvatore Billeci, on or about the 6th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as nine bindles containing approximately nine drams of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Seventh Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Frank Flier, on or about the 6th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing [4] approximately one ounce of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Eighth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno, on or about the 7th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as defendant then and there knew.

Ninth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 7th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Tenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent

Bruno, on or about the 7th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in [5] quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Eleventh Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Frank Flier, on or about the 8th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twelfth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Richard Benson, on or about the 8th day of January, 1946, in the City and County of San Francisco, State of

California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Thirteenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno, on or about the 8th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a [6] derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Fourteenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 8th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit,

a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Fifteenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 9th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Sixteenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Frank Flier, on or about the 9th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did [7] conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States

of America contrary to law, as said defendants then and there knew.

Seventeenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 9th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Eighteenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and John Orman Knight, on or about the 9th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Nineteenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Frank Flier, on or about the 10th day of January, 1946, in the City and County of [8] San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twentieth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and John Orman Knight, on or about the 10th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twenty-first Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Mike J. Billeci, on or about the 10th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twenty-second Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno, Frank Flier, and Mike J. Billeci, [9] on or about the 10th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twenty-third Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Joseph Pitta, on or about the 10th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twenty-fourth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno, Joseph Pitta and Millard Davis, on or about the 11th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew. [10]

Twenty-fifth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 11th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Twenty-sixth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and John Orman Knight, on or about the 14th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twenty-seventh Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent

Bruno, on or about the 14th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said [11] defendant then and there knew.

Twenty-eighth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and John Orman Knight, on or about the 14th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twenty-ninth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and John Orman Knight, on or about the 14th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently

and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirtieth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and John Christopher, on or about the 14th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported [12] into the United States of America contrary to law, as said defendants then and there knew.

Thirty-first Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno, on or about the 15th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit,

a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirty-second Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That John Orman Knight, on or about the 15th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Thirty-third Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and Harry Fisher, on or about the 15th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in [13] quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin

had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirty-fourth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Frank Arriola, on or about the 15th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirty-fifth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno, Frank Flier and John Orman Knight, on or about the 16th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the

United States of America contrary to law, as said defendants then and there knew.

Thirty-sixth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and John Orman Knight, on or about the 17th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did [14] conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirty-seventh Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and John Christopher, on or about the 17th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirty-eighth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and John Christopher, on or about the 17th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirty-ninth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and Renaldo Ferrari, on or about the 17th day of January, 1946, in the City and County of [15] San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Fortieth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno, Frank Flier and Renaldo Ferrari, on or about the 28th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Forty-first Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno, on or about the 28th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Forty-second Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank

Flier, [16] on or about the 28th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle, containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Forty-third Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 29th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin, had been imported into the United States of America contrary to law, as said defendant then and there knew.

Forty-fourth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and John Orman Knight, on or about the 30th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and

knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew. [17]

Forty-Fifth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and Samuel Louis Cohen, on or about the 30th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Forty-Sixth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and John Orman Knight, on or about the 31st day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and

preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Forty-Seventh Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and Stanley Paliwoda, on or about the 1st day of February, 1946, in the City and County of San Francisco, State of California fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported [18] into the United States of American contrary to law, as said defendants then and there knew.

Forty-Eighth Count

(Jones-Miller Act. 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier, John Orman Knight and Henry Gourdin, on or about the 1st day of February, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of

heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Forty-Ninth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and Henry Gourdin, on or about the 1st day of February, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Fiftieth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 2nd day of February, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in [19] quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Fifty-First Count

(Harrison Narcotic Act, 26 U.S.C., Secs. 2553
and 2557)

The Grand Jury further charges: That Frank Flier, on or about the 2nd day of February, 1946, in the City and County of San Francisco, State of California, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle contained approximately one dram of heroin.

Fifty-Second Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Millard Davis, on or about the 2nd day of February, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Fifty-Third Count

(Harrison Narcotic Act, 26 U.S.C., Secs. 2553
and 2557)

The Grand Jury further charges: That Frank

Flier, on or about the 3rd day of February, 1946, in the City and County of San Francisco, State of California, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, [20] a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin.

Fifty-Fourth Count

(Jones-Miller Act, 21 U.S.C., 174)

The Grand Jury further charges: That Stanley Paliwoda, on or about the 3rd day of February, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Fifty-Fifth Count

Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno, Frank Flier, Salvatore Billeci, Renaldo Ferrari and Samuel Louis Cohen, on or about the 21st day of February, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the con-

concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bundle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Fifty-Sixth Count

(Conspiracy, 18 U.S.C., Section 88)

The Grand Jury further charges: That Vincent Bruno, Frank Flier, Salvatore Billeci, Renaldo Ferrari, Richard Benson, Mike J. Billeci, John Christopher, John Orman Knight, Joseph Pitta, Samuel Louis Cohen, Stanley Paliwoda, Henry Gourdin, Millard Davis, Paul Crivello, John Ternullo, Harry Fisher and Frank Arriola, at a time and place to the said Grand Jury unknown, did feloniously [21] conspire together and with other persons whose names are to said Grand Jury unknown, to receive, conceal, buy, sell and facilitate the transportation and concealment of a derivative and preparation of morphine, to-wit, heroin, which had been imported into the United States of America contrary to law, as said defendants then and there knew, in violation of Section 174, Title 21, United States Code; that thereafter and during the existence of said conspiracy, one or more of said defendants hereinafter mentioned by name, in the City and County of San Francisco, State of California, within said Division and District, and at other places as hereinafter alleged, did the fol-

lowing acts in furtherance of and to effect the object of the conspiracy aforesaid:

1. On January 5, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Vincent Bruno removed a bindle of heroin from underneath a beer case. At that time and place he held a conversation with the defendant Salvatore Billeci.

2. On February 6, 1946, the defendants Vincent Bruno and Salvatore Billeci left the United States of America and entered the United States of Mexico at Calexico, California.

3. On January 12, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Frank Flier held a conversation with the defendant Millard Davis.

4. On January 6, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Frank Flier received an unknown amount of currency from the defendant Millard Davis.

5. On January 6, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of [22] San Francisco, State of California, the defendant Salvatore Billeci poured the contents of eight or nine bindles of heroin into another package.

6. On February 2, 1946, the defendants Salvatore Billeci and Vincent Bruno entered the United

States of America from the United States of Mexico at Calexico, California.

7. On March 1, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Renaldo Ferrari held a conversation with the defendants Vincent Bruno and Frank Flier, and at that time the defendant Renaldo Ferrari received an unknown amount of currency from the defendant Frank Flier.

8. On January 8, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Richard Benson removed a bindle of heroin from the shelf of the storeroom.

9. On January 10, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Mike J. Billeci had a conversation with the defendants Frank Flier and Vincent Bruno.

10. On January 17, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant John Christopher held a conversation with the defendant Frank Flier.

11. On January 14, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant John Orman Knight held a conversation with the defendant Frank Flier.

12. On January 15, 1946, at the premises known

as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant John Orman Knight [23] removed a bindle of heroin from a fuse box in the hallway and put the bindle in his pocket.

13. On January 11, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Joseph Pitta held a conversation with the defendants Vincent Bruno and Frank Flier.

14. On January 31, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Samuel Louis Cohen received a bindle of heroin from the defendant Frank Flier.

15. On February 1, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Stanley Paliwoda had a conversation with the defendant Frank Flier.

16. On February 13, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Stanley Paliwoda had a conversation with the defendant Vincent Bruno.

17. On February 11, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Henry Gourdin had a conversation with the defendants Frank Flier, John Orman Knight and Vincent Bruno.

18. On January 12, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Millard Davis held a conversation with the defendant Frank Flier.

19. On February 2, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Millard Davis [24] received a bindle of heroin from the defendant Frank Flier and concealed it on his person.

20. On January 11, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Paul Crivello received an unknown amount of currency from the defendant Frank Flier.

21. On February 11, 1946, at the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant John Ternullo had a conversation with the defendants Vincent Bruno, Renaldo Ferrari and Frank Arriola. Thereafter, on the same day, he drive in his automobile to the vicinity of Geary and Divisadero Streets, in the City and County of San Francisco, State of California.

22. On February 26, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant John Ternullo had a conversation with the defendant Frank Flier.

23. On January 15, 1946, in the premises known

as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Harry Fisher received a bindle of heroin from the defendant Frank Flier.

24. On February 11, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Frank Arriola had a conversation with the defendants Vincent Bruno, Renaldo Ferrari and John Ternullo.

A True Bill.

ARTHUR J. KAHN,

Foreman.

/s/ FRANK J. HENNESSY,

United States Attorney.

(Approved as to form: R. B. McM.)

Bail, \$2500.00 each.

[Endorsed]: Presented in open court and filed:
Sept. 18, 1946.

[Title of District Court and Cause.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday the 2nd day of December, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

DEFENDANT JOSEPH PITTA'S PLEA OF
NOT GUILTY ENTERED

This cause came on regularly this day for hearing on motion for separate trials, also for entry of plea of defendant Vincent Bruno, et al. Daniel C. Deasy, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendants herein and their attorneys were present as heretofore. Defendants x x x and Joseph Pitta each entered a plea of "Not Guilty" to the Indictment filed herein, which said pleas were ordered entered. [26]

[Title of District Court and Cause.]

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 22nd day of April, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

ORDER GRANTING MOTIONS FOR SEVER-
ANCE OF TRIAL, AND TRIAL OF DE-
FENDANT JOE PITTA

The defendants and their attorneys being present, the cases of these defendants came on regularly this day for trial. After hearing the attorneys

herein, the Court advising the parties hereto that the motions for severance of trial had been granted, and James T. Davis, Esq., Assistant United States Attorney, advising the Court that it was the intention of the United States Attorney to proceed with substantive offenses contained in the Indictment and not the conspiracy charge, the Court thereupon ordered that the case of defendant Joe Pitta proceed to trial.

The defendant Joe Pitta was present in Court with his attorneys, William Klein, Esq., and Roger Brame, Esq. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States. Thereupon the following named persons, viz:

Albert R. Dunlap

Mrs. Addie L. Roberts

Miss Loretta J. Noethig

John H. Fisher

Mrs. Martha A. Buckingham

Vincenzo D'Amico

Mrs. S. Louisa Alexander

Mrs. Hermine A. Bulgures

Nevile Osborn, Jr.

Mrs. Caroline A. Wilhelmi

Lavell S. Durrell

Mrs. Sadye J. B. Greenberg

twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Davis made an opening statement to the Court and Jury. G. E. Mallory, Thomas E. McGuire, William H. Grady

and Elmer A. Briscoe were sworn and testified on behalf of the United States. Mr. Davis introduced in evidence and filed U. S. Exhibits Nos. 1, 2, 3. Mr. Klein offered for identification certain exhibits which were marked Defendant's Exhibits A, B, C, D for identification. The United States then rested. The hour of adjournment having arrived, it is Ordered that the further trial of this case be continued to April 23, 1946, at 9:30 a.m. [27]

I Hereby Certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled case.

Attest my hand and seal of said District Court, this 19th day of May, A.D. 1947.

[Seal] C. W. CALBREATH,
Clerk.

In the Southern Division of the United States
District Court for the Northern District of
California, First Division

No. 30449G

THE UNITED STATES OF AMERICA,
vs.

JOE PITTA.

VERDICT

We, the Jury, find as to the defendant at the bar as follows: Guilty as to Count 23 of the Indictment.

L. S. DURRELL,
Foreman.

[Endorsed]: Filed Apr. 23, 1947. [28]

District Court of the United States for the Northern
District of California, Southern Division

No. 30449 G

UNITED STATES OF AMERICA,

vs.

JOSEPH PITTA.

JUDGMENT AND COMMITMENT

On this 23rd day of April, 1947, came the attorney for the government and the defendant appeared in person and with counsel.

It is adjudged that the defendant has been convicted upon his plead of not guilty and a verdict of guilty of the offense of Jones-Miller Act, 21 U. S. C., Section 174, in that defendant did on or about January 10, 1946, in San Francisco, California, unlawfully conceal and facilitate the concealment of a certain lot of heroin, as charged, in Count 23 of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years and pay a fine to the United States of America in the sum of one Dollar (\$1.00) on County Twenty-three of the Indictment.

It is recommended by the Court that the defendant receive any needed hospitalization in a Narcotic Hospital during period of imprisonment, and if defendant be discharged from said Narcotic Hospital prior to expiration of the Two (2) Year term of imprisonment imposed herein and the defendant be eligible for parole, it is the further recommendation of the Court that the defendant be paroled.

It is further ordered that all remaining counts contained in the Indictment be dismissed as to defendant Joseph Pitta.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

LOUIS E. GOODMAN,
United States District Judge.

Examined by:

JAMES T. DAVIS,
Asst. U. S. Attorney.

The Court recommends commitment to U. S. Penitentiary.

Filed and entered this 23rd day of April, 1947,
C. W. Calbreath, Clerk; L. R. Elkington, Deputy Clerk.

A True Copy. Certified this 23rd day of April, 1947.

/s/ C. W. CALBREATH,
Clerk.

Entered in vol. 38 Judg. and Decrees at page 88.

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 30449G

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PITTA, et al.,

Defendants.

NOTICE OF APPEAL

Name and address of appellant: Joseph Pitta,
San Francisco County Jail, San Francisco, Cali-
fornia.

Name and address of appellant's attorney: James
B. O'Connor, Balfour Building, 351 California
Street, San Francisco, California.

Offense: Title 21 U. S. C. A., Section 174.

Concise statement of judgment, etc.:

Appellant was found guilty by verdict of jury
on April 23, 1947, of Count 23 of indictment:

The appellant was sentenced to serve a term of
two (2) years in an institution of the penitentiary
type and to pay a fine of One (\$1.00) on April 23,
1947.

Name of Institution where now confined: San
Francisco County Jail, San Bruno Branch, San
Bruno, California.

I, the above-named appellant, hereby appeal to

the United States Circuit Court of Appeal for the Ninth Circuit from the above stated judgment.

May 1, 1947.

JOSEPH PITTA,
Appellant.

[Endorsed]: Filed May 1, 1947. [31]

[Title of District Court and Cause.]

STATEMENT OF DOCKET ENTRIES

1. Indictment or information for 21 USC 174 Jones-Miller Act, 26 USC 2553 & 2557 Harrison Narcotic Act.

Filed Sept. 18, 1946.

2. Arraignment: Oct. 10, 1946.

3. Plea to indictment or information: Not Guilty Dec. 2, 1946.

4. Motion to withdraw plea of guilty denied.

5. Trial by jury, or by court if jury waived: Apr. 22, 1947.

6. Verdict or finding of guilt: Apr. 23, 1947. Adjudged guilty to Ct. 23.

7. Judgment—(with terms of sentence) or order: 2 yrs. in U. S. Pen. and a fine of \$1.00.

Entered Apr. 23, 1947.

8. Notice of appeal filed May 1, 1947.

Dated May 1, 1947.

Attest:

C. W. CALBREATH,
Clerk.

[Endorsed]: Filed May 1, 1947. [32]

[Title of District Court and Cause.]

NOTICE

To: Frank J. Hennessy,
U. S. Attorney.

You are hereby notified that a judgment was entered of record in this office in the above-entitled case.

You are hereby notified that on May 1, 1947, a Notice of Appeal was filed by Joseph Pitta in the above entitled case. A copy of which is enclosed herewith.

C. W. CALBREATH,
Clerk, U. S. District Court.

San Francisco, California, May 6, 1947.

[Endorsed]: Filed May 6, 1947. [33]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

Now comes the appellant, Joseph Pitta, and does hereby designate the complete record and all the proceedings and evidence in the above-entitled action as the contents of his record on appeal.

Dated: May 13, 1947.

/s/ JAMES B. O'CONNOR,
Attorney for Appellant.

[Endorsed]: Filed May 13, 1947. [34]

District Court of the United States, Northern
District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 34 pages, numbered from 1 to 34, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of The United States of America, Plaintiff, vs. Joseph Pitta, Defendant, No. 30449 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$13.60 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 3rd day of June, A. D. 1947.

[Seal]

C. W. CALBREATH,
Clerk,

By /s/ M. E. VAN BUREN,
Deputy Clerk. [35]

In the Southern Division of the United States
District Court for the Northern District of
California

Before: Hon. Louis E. Goodman, Judge

No. 30,449

UNITED STATES OF AMERICA,

vs.

JOSEPH PITTA,

Defendant.

REPORTER'S TRANSCRIPT

Tuesday, April 22, 1947

Counsel Appearing:

For the United States: James T. Davis, Esq.,
Assistant United States Attorney.

For Defendant: Roger Brame, Esq., William
Klein, Esq. [1*]

(A jury was duly impaneled and sworn to
try the cause, after which the following pro-
ceedings were had:)

The Court: Now, ladies and gentlemen, the
taking of evidence in this case will be postponed
until this afternoon at two o'clock. I will ask you
to return at that time, and I shall also caution you
at this time during your absence it will be your duty
not to talk about the case among yourselves nor with
anybody else, nor to form or express any opinion
concerning the case until it is finally submitted to

*Page numbering appearing at top of page of original Reporter's
Transcript.

you. We will resume the trial of the case at two o'clock.

(An adjournment was thereupon taken until 2:00 o'clock p.m.) [2]

Afternoon Session, April 22, 1947, 2:00 P.M.

The Clerk: United States vs. Pitta.

Mr. Davis: Ready.

Mr. Klein: Ready.

The Court: Do you wish to make an opening statement?

Mr. Davis: Yes, a short one.

Mr. Klein: If it please your Honor, before the opening statement is made, may I respectfully ask that the witnesses for the Government be excluded from the courtroom?

The Court: Do you have any witnesses aside from Mr. Grady?

Mr. Davis: Yes, I will ask that Mr. Grady remain, and that the chemist, Mr. Mallory remain. You have no objection to that?

Mr. Klein: None, at all.

The Court: All witnesses except Mr. Grady and Mr. Mallory will remain outside the courtroom until called.

Mr. Davis: Your Honor, and ladies and gentlemen of the jury, I have no intention of taking up a great deal of your time with a lengthy opening statement, because essentially this case is a very simple one, and very simple on the facts. It is briefly this: The defendant is charged in one count

of a long indictment that on the 10th day of January, 1946, in the City and County of San Francisco, that he fraudulently and knowingly did conceal and facilitate the concealment of a [3] derivative and preparation of morphine, to-wit, a lot of heroin in an amount particularly described as one bindle, containing approximately one dram of heroin. A bindle is normally a small package about the length of a razor blade, and slightly wider than one half the width of a razor blade. His Honor will instruct you on the law of the case, and I believe you will be instructed, because it is the law, that when a defendant is shown to have had possession of the narcotics, that possession——

Mr. Klein: If it please your Honor, I object to the statement of the District Attorney in an opening statement. I do not think that is proper in an opening statement.

Mr. Davis: I will withdraw it, your Honor. I usually do it in narcotics cases, because of the peculiarity of the language of the statute, so that while the jury is deliberating or, rather, weighing the evidence, it always seemed to me to be very helpful if they knew exactly what they were dealing with—in other words, what the specific charge is—and I think that since the statute uses the words “conceal” and “facilitate the concealment,” it is helpful to the jury, and I do not believe injurious to the defendant, if the jury is apprized beforehand that actually the principal fact they are concerned with is the possession of the narcotics, but if counsel objects I do not want to press it. But I do not see

how it prejudices the defendant. In any event, if he does not think that it should be stated, I do not want to raise any technicalities in this case, because, as I say, it is a very simple case.

In any event, ladies and gentlemen, what the Government is prepared to show is as follows: That the agents, acting upon previous information that a certain bar in San Francisco, the Star Dust Bar, on Sutter Street—that narcotics were being dealt in there, sold and dispensed. They went up, and over a period of, I believe, approximately two months, maintained an observation post in a room next to the basement storeroom of the Star Dust Bar. The agents will describe to you the location of the room from which they observed everything that went on in the storeroom and the length of time over which they maintained their surveillance.

In this particular case they were in there on the 10th day of January at their observation post. I think we will find some of the agents were in and out at different times, but I think the evidence will show that at some time—at all times there was at least one agent in that storeroom watching the premises, or, rather in the observation room watching the storeroom. They will testify that at a certain time on that day another man, other than the defendant, who is not on trial here today, placed this bindle of heroin beneath certain beer cases which were stacked in rows along the wall and floor of this storeroom, that after this man went out and there was no [5] one in the room, the agents went in, took that bindle from its hiding place, opened

it, abstracted some of its contents, folded the bindle again, and put it back in its hiding place; that they took the contents which they had abstracted and delivered them to the Government chemist of the United States Treasury Department, who will testify that the substance which was delivered to him, and the substance which had been removed from the bindle, was heroin. The agents will then testify cumulatively again, as I say, that at all times from the time that bindle was placed there, and from the time they took out the sample, it was kept under constant observation, and that no one else came and removed that bindle or touched the bindle, or could have altered its contents or added or abstracted anything from it until later on in that day, or I believe in the early part of the evening, the defendant in this case and another defendant, who has been dismissed from this particular case, because he happens to be convicted——

Mr. Klein: Just a moment. If it please your Honor, I respectfully submit that it is improper to make any reference to this defendant who has been convicted at this stage of the proceedings. I except to the remarks of counsel.

Mr. Davis: I am entitled, your Honor, to show what the evidence is going to show, that another man named in this indictment was in the room with the defendant at that time, to explain why he is not on trial, and I have told the jury [6] he is convicted of some other offense. I am not telling them that he is convicted of this offense. That certainly is not prejudicial to the defendant, and it is some-

thing the Government is entitled to introduce to explain to the jury why we haven't the other man who is involved in this offense on trial.

Mr. Klein: I respectfully urge my objection.

The Court: I will overrule the objection.

Mr. Davis: So that he enters with this other man, they remove the bindle from its hiding place, and they both used the contents or portions of the contents of that bindle—in other words, they both used heroin there in that room. I believe they had some conversation. I am not certain whether they did, or if they did, if it is all pertinent in this case. In any event, they removed that bindle, used the contents or portions of it, and put the bindle back in its hiding place, and then they left the room. That is the substance of this case. The charge is that the defendant on that day, and in that place, concealed and facilitated the concealment of heroin, and having proved the facts which I have outlined to you, ladies and gentlemen, I will ask that you return a verdict of guilty as charged.

Do you wish to reserve your opening statement?

Mr. Klein: Yes, I do.

Mr. Davis: May I call a witness out of order, your Honor? [7]

The Court: Yes.

G. E. MALLORY

called as a witness on behalf of the Government;
sworn.

Q. (By the Clerk): Will you state your name
to the court and jury? A. G. E. Mallory.

Direct Examination

By Mr. Davis:

Q. Mr. Mallory, what is your occupation?

A. Chemist, employed by the U. S. Treasury Department, Bureau of Internal Revenue.

Q. How long have you been engaged in that
occupation? A. 26 years.

Q. In the course of your occupation do you have
occasion, at the request of the Narcotic Bureau of
the Federal Government, to examine the contents
of certain packages which are turned over to you?

A. Yes, sir.

Q. Do you perform certain tests to determine
the contents? A. Yes, sir.

Q. Did you bring with you today a package
which had been so examined by you?

A. Yes, sir.

Q. May I see it?

A. (Handing a package to Mr. Davis.) [8]

Q. I will show you this small white paper and
ask you from whom you received that.

A. I received that from the Bureau of Narcotics
—Narcotic Agent Briscoe.

Q. Can you state when you received it?

A. It was on the 15th day of January, 1946.

(Testimony of G. E. Mallory.)

Q. Did you perform the tests which you have mentioned upon the contents of that package?

A. Yes, sir.

Q. Can you tell us from those tests what that package contained?

A. The package contained 3 grains of heroin hydrochloride,

Q. Has that package been continuously in your possession since the time you received it from Agent Briscoe until it was introduced in court here today?

A. Yes, sir.

Mr. Davis: If the Court please, I will ask that this small package, white paper package previously shown to the witness, be marked Government's Exhibit first in order for purposes of identification.

(The package in question was thereupon marked U. S. Exhibit 1 for Identification.)

Q. (By Mr. Davis): I will show you this envelope marked among other things, "Laboratory No. 152,489," and ask you if that is the envelope in which you placed Exhibit No. 1 for Identification? [9]

A. Yes, sir.

Q. After you had examined it?

A. Yes, sir.

Mr. Davis: If the Court please, I offer this envelope, "Treasury Department, Bureau of Narcotics, Laboratory 152,489" as Government's Exhibit next in order for purposes of identification.

(The envelope in question was marked U. S. Exhibit 2 for Identification.)

(Testimony of G. E. Mallory.)

Mr. Davis: That is all of this witness, your Honor.

Cross-Examination

By Mr. Klein:

Q. Mr. Mallory, all that you know about this matter is that on January 15th a certain package was handed to you for your analysis, is that right?

A. That is correct.

Q. And you are definitely satisfied that January 15th is the correct date?

A. That was handed to me personally on January 15th by Narcotic Agent Briscoe.

Q. Do you remember the time of the day?

A. I don't remember it, no.

Mr. Klein: That is all.

Mr. Davis: I will call Mr. McGuire. [10]

THOMAS E. McGUIRE

called as a witness on behalf of the Government;
sworn.

Q. (By the Clerk): State your name to the Court and jury. A. Thomas E. McGuire.

Direct Examination

By Mr. Davis:

Q. Mr. McGuire, what is your occupation, please? A. Federal Narcotics Agent.

Q. How long have you been engaged in that occupation? A. Approximately 20 years.

Q. Directing your particular attention to the month of January, 1946, were you familiar with

(Testimony of Thomas E. McGuire.)

certain premises in San Francisco known as the Star Dust Bar? A. Yes, sir, I was.

Q. Where was that place located?

A. It was located in the northeast corner of Larkin and Sutter Street, in San Francisco.

Q. As preliminary to the date in question, is it or is it not a fact that you and other agents had an observation post in that building from which you could observe the basement storeroom of the Star Dust Bar? A. Yes, sir, I did.

Q. Over what period of time was that observation post maintained, would you say?

A. Well, it started on January 5th and it ran for approximately, [11] I should judge, between six and eight weeks, if not longer.

Q. Will you describe for the aid of the jury the actual physical situation there, as far as the storeroom and the observation post which you and other agents had established?

A. Yes, sir. There was quite a large cellar. The entire physical outline of the cellar was the bottom of this six story building. The cellar was cut up so that they had a room which was used for storage of baggage and trunks and the unused furniture from the furnished apartments. That room, I should judge—I have the exact figures here; at least it was measured exactly—but it ran approximately 30 feet long and approximately 20 or 30 feet wide. That was the storage room in which we were concealed. That room had a lock, a padlock, and the key was furnished by the owner of the building, and

(Testimony of Thomas E. McGuire.)

the manager of the building. That room was in one corner of the entire basement.

Immediately adjoining that room, with a very light wood partition, was a liquor room, a storeroom that pertained to the Star Dust Bar, and contained numerous bottles of an assortment of liquors and wines. That room was approximately nine feet by, I should judge, nine or ten feet in length. At least it was within about six or seven feet narrower than the storeroom we were in. It was a public hall from the bar, the rear of the Star Dust Bar leading to a public toilet that was some 50 feet across the hall from where we were concealed. [12] There were other storerooms in the basement. Some I know belonged to the Star Dust Bar, and if I am not mistaken there was a boiler room in the basement, and there was an areaway, and an airshaft well that led into the basement, but physically the baggage room in which we were concealed and the liquor storeroom were adjoining one another.

Q. From your position in the baggage room could you or could you not see into the storeroom of the Star Dust Bar which you have described?

Mr. Klein: If it please your Honor, I submit that would be a question for the jury to determine after the witness describes the rooms and the method of seeing.

Mr. Davis: That is a preliminary question of how he did so. That is what I intended to bring out next.

The Court: I will overrule the objection.

(Testimony of Thomas E. McGuire.)

The Witness: Then the partition between the liquor storeroom pertaining to the Star Dust Bar and the baggage room, in which the agents were concealed, there were four holes approximately four inches by eight inches along the wall, the wooden partition. As I said, the wooden partition between the liquor storeroom and the baggage room was of very light construction, and they had these four holes already in. There were numerous openings between the boards likewise. However, the openings were very large. I might add also that over the [13] entire wooden partition was a thin wire net, more or less like chicken coop wire, which likewise were over the holes. However, they were quite large holes in this chicken wire. Those four holes were in the wooden partition that was within the baggage room, and which we used to observe the actions in the liquor room.

On the outside of the liquor room, as I say, the partition of the baggage room was longer than the partition of the liquor room, so that there were two holes made in the partition leading into the public hall, so that while within the baggage room through the four openings in the partition observation could be had of the liquor room, and the two holes on the outside of the liquor room allowing access and viewpoint of the public hallway and the toilets on the other parts of the hall, other than what was in the liquor room.

Q. (By Mr. Davis): Incidentally, Mr. McGuire, do you have in your possession today a dia-

(Testimony of Thomas E. McGuire.)

gram of that building, the liquor room, and store-room? A. Yes, sir, I have.

Q. May I see it?

(A diagram was handed to Mr. Davis.)

Mr. Klein: This is a rather complex diagram, your Honor. I will be through with it in just a moment.

Q. (By Mr. Davis): Did you prepare this diagram, Mr McGuire?

A. No, sir, but it was in consultation with Mr. Grady. [14]

Q. Have you examined it?

A. Yes, sir, I have.

Q. Is it a true and accurate diagram of the premises as you have described them, according to your recollection? A. It is, Mr. Davis.

Mr. Davis: If the Court please, I would like to offer this as Government's exhibit next in order for purposes of identification, and I should like to be permitted to allow the jury to examine it so that they may have a picture of the situation when they hear the testimony.

The Court: Very well.

(The diagram in question was thereupon received in evidence and marked U. S. Exhibit 3.)

Mr. Davis: Does your Honor want me to proceed with the examination?

The Court: I think it would save a lot of time

(Testimony of Thomas E. McGuire.)

if you put it on the blackboard and described it to all the jurors at the same time.

Mr. Klein: May I be permitted, your Honor, to stand in a position so I may view it?

The Court: Yes.

Q. (By Mr. Davis): Can you see that from there, Mr. McGuire? A. Yes.

Q. This room, here, approximately——

A. Mr. Davis, his Honor cannot see it very well.

(The blackboard was moved slightly.)

Mr. Davis: Q. This room here, which is marked "Storeroom," according to this diagram is approximately 9 feet by 23 feet, is that right?

A. That is correct.

Q. What is this?

A. That is a public hallway leading from the back passage areaway in the rear of the building. That is a public hall.

Q. And this room marked "Liquor room" approximately 9'6 by——

A. It is about the width of a door plus 4 feet, Mr. Davis—I should judge about 8 feet shorter than the baggage room.

Q. About 8 feet shorter this way than this way (indicating)? A. That is right.

Q. This was a liquor storeroom?

A. That is the liquor storeroom, yes, sir.

Q. Where were these holes that you testified to as being in this partition between the storeroom and the baggage room?

(Testimony of Thomas E. McGuire.)

A. They are marked with—I will have to step down, if your Honor please—they are marked here with these crosses, 3, 4, 5 and 6. They are not crosses, but they are numbers, 1, 2, 3, 4, 5, and 6. The approximate openings of each is marked down here. These two are outside the liquor storeroom, while these four are within. This is from the baggage room into the liquor room, through these four holes, and [16] these two holes are from the baggage room into the public hallway.

Q. This is a hallway, here?

A. That is a general hallway.

Q. What is this?

A. This is a general hallway, likewise. This is out to an air shaft, and this is out to the areaway, and this is the entrance to the Star Dust Bar (indicating).

Q. So that four of the holes from the storeroom look into the liquor room, and two of them out into the open hall, is that correct?

A. Yes, sir.

Q. Directing your particular attention to the 10th day of January, 1946, were you in the storeroom making observations into the liquor room?

A. I was.

Q. What time of the day did you first commence to make observations?

A. On that particular day I went there at four o'clock in the afternoon.

Q. Who, if anyone else, was with you in the baggage room?

(Testimony of Thomas E. McGuire.)

A. I joined Mr. Grady, Mr. Hays, and Mr. Briscoe, three narcotics agents from my office.

Q. Pardon me. I didn't hear the answer.

A. Mr. Hays, Mr. Grady, and Mr. Briscoe, three narcotics agents [17] from my office.

Q. How long did you remain in there on that evening?

A. On that particular occasion we left, I should judge, about 12:30 or 1:00 o'clock in the morning. That was the usual routine.

Q. Were you in there from four until—what time did you say, about?

A. 12 o'clock at night, 12:30, I should judge.

Q. Were you constantly in the storeroom observing what was going on in the liquor room from 4:00 until 12:30 on that day?

A. No, sir, barring the time I had dinner, which was from 6:30 to about quarter after seven was the only time that I wasn't there.

The Court: Q. Some other agent was there during that time?

A. Oh, yes, I relieved Mr. Hays for his dinner hour and he relieved me for mine.

Mr. Davis: Q. What was the first thing, if anything, in connection with this case that you observed while you were in that baggage room?

A. Well, at 7:30, upon my return from dinner, a conference was had with the agents, and the actions discussed of what had taken place during the afternoon, and at 7:30 Mr. Grady stepped out of the baggage room door and obtained a bundle of a

(Testimony of Thomas E. McGuire.)

white substance, which later was determined to be heroin.

Mr. Klein: Q. Who said that? [18]

A. Mr. Grady.

Q. Grady stepped out where?

A. Out of the baggage room to a place of concealment, which was right outside of the door leading to the liquor room.

Mr. Davis: Q. Where would that be on the diagram, Mr. McGuire?

A. This is the doorway out of the baggage room (indicating). This is the partition, this is the doorway; this is the doorway leading into the liquor room. This is what we call the beer cases, the empty beer cases. That was the place of concealment from which Mr. Grady obtained the bindle that is here as evidence. Mr. Grady stepped through this door while I held the door, obtained the bindle, and then we came right into the baggage room.

Q. In order to do that did he have to enter the liquor room?

A. Oh, no, the place of concealment is outside. This door is closed, as this door is. This is just the opening.

Q. Am I correct in assuming that there were beer cases stacked up in the hallway outside the door of the liquor room, is that correct?

A. That is correct, yes, sir.

Q. Describe, if you can, in more detail, what happened when Mr. Grady went out there.

A. Mr. Grady went out, and there were four

(Testimony of Thomas E. McGuire.)

or five empty beer cartons, large cases of beer. The empty cartons, the cardboard [19] cartons stacked immediately adjoining the door to the liquor room. Mr. Grady opened between the third and fourth, just tipped the two beer cartons apart, and obtained a small piece of white paper that was in between the two beer cartons. Incidentally, he came into the baggage room where I and the other agents were concealed. We opened that package, abstracted some of the white substance that had been in the package, refolded the paper in the original folds, and Mr. Grady then brought the package out and replaced it exactly as he found it, between the two empty liquor cases or beer cases.

Q. Were you holding the door or did you observe Mr. Grady when he went out and put the bindle back? A. Yes, sir, I did.

Q. I will show you Government's Exhibit No. 1 For Identification, and ask you if this is the package which you say you placed some of the contents in that was removed from the bindle?

A. Yes, sir, it is. My initials are on this package. This is a piece of the notebook that was used to place the white substance within.

Q. When did you place your initials on there?

A. At the time the package was folded, after the substance was placed in it.

Q. Did you personally keep possession of this package? [20]

A. No, sir, Mr. Grady did. He maintained possession of it.

(Testimony of Thomas E. McGuire.)

Q. And that was at 7:30 in the evening, is that correct? A. Yes, sir, it was.

Q. Did you have an occasion to see the defendant on that evening? A. Yes, sir, I did.

Q. At approximately what time?

A. Approximately 10:45 p.m. of that evening. This defendant was observed by myself and the other agent enter the liquor storeroom.

Q. Who, if anyone else, was with him, if you know?

A. Yes, Vince Bruno, a man I know as Vince Bruno.

Q. What did you observe then at that time?

A. I observed Vince Bruno go to the same place of concealment in the empty beer cartons that was outside the liquor storeroom, remove the same bindle which Mr. Grady had removed previously and restored there; I saw the defendant and Vincent Bruno enter the liquor storeroom and lock the door with the defendant, Joe Pitta, in the liquor room.

Q. In order that there may be no misunderstanding, exactly how did that take place? Did Bruno and the defendant come along the hall?

A. Together, from the entrance of the liquor store—the bar. Both of them left the bar and came into the hall.

Q. When was it that the bindle was removed by Bruno from the [21] beer cases? Before they went into the storeroom?

A. No, just as they were in the act of going in.

(Testimony of Thomas E. McGuire.)

In other words, to make myself clear, Bruno opened the storeroom and at the same time holding the door with his foot he extracted the bindle from the hiding place. Then both defendants entered, and both were in the liquor store when Bruno locked the liquor store.

Q. Where were you standing in your observation post when you observed the first part of this transaction, coming from the bar? I think if you refer to it by number we can see it.

A. There were two points, No. 1 and No. 2. No. 2 was the higher observation point; No. 2 was the low one. I was sitting at the low one so I could observe the man as he came from here. This is a little longer than what it should be, but as he comes over about here I could see him. I could observe him from here to here (indicating), and I could observe him at this beer case withdraw the bindle. Then they both went in, and I went from this spot over to one of these observation points so I could observe him there.

Q. Tell me, from observation post No. 1 over to the beer cases where the bindle was concealed, what in your opinion would be the approximate distance?

A. Not more than—judging the distance of the door to be $3\frac{1}{2}$ feet—not more than 5 feet, 5 or 6 feet at the most.

Q. What was the condition of the lighting of the hallway at [22] the time?

A. It was all lighted.

Q. Where is the light in the hall, if you recall?

(Testimony of Thomas E. McGuire.)

A. There was one large light that was more than sufficient to light the hallway up, due to its being used so frequently for the men's room.

Q. You say that you saw him remove a bindle similar to one that had been put in there, so far as you know?

A. Yes, sir, I seen him remove the bindle.

Q. What, if anything, transpired after Bruno and the defendant went into the storeroom?

A. The defendant Bruno opened the package of heroin, the white substance, and using a penknife, which was on a small table there, he took a little bit on the edge of the end of the knife and sniffed it in both nostrils. He then passed the knife and the paper to the defendant Pitta, who likewise dipped into the same supply of white substance, placed it to his nose, and with deep inhalations withdrew the white substance into his nostrils.

Q. Did or did not the defendant and Bruno have an conversation at that time which would be pertinent to this case, here?

Mr. Klein: Just a moment. I object to the form of the question: Did the defendant and Bruno have some kind of a conversation which would be pertinent?

The Court: I will sustain that objection. Have him [23] state any conversation that he heard.

Mr. Davis: Q. Was there any conversation?

A. Yes, sir, there was conversation dealing with details—other details which I have consulted with you on. I can relate them here.

(Testimony of Thomas E. McGuire.)

Q. No, I am not going to put those in.

The Court: You mean was there any conversation concerning this heroin? Is that what you mean?

Mr. Davis: That is right. In other words, there was a conversation, your Honor, which I consider might be prejudicial and therefore I do not want to put it in.

The Court: Q. Was there any conversation on the subject of the heroin?

A. No sir, there was very little conversation at this particular instant; there was very little conversation relative to the heroin, and the use. Both of them just used it, and then I observed the defendant Pitta refold the paper in the same manner in which it was originally—in other words, the paper is quite large, and it fell easily into the folds, in the peculiar way in which it was folded, and it was returned with the penknife to Bruno. Bruno then took the same package and replaced it in the place of concealment between the beer boxes outside the liquor room.

Mr. Davis: Q. About how long were they in the liquor storeroom? [24]

A. On this particular occasion they were only there about, I should judge, three to five minutes, if that long.

Q. What occurred, if anything, after that?

A. Both of them left the liquor room and both returned to the bar.

Q. And you stayed there until approximately 12:30, if I understand your testimony?

(Testimony of Thomas E. McGuire.)

A. Yes, sir, until I was sure that all had left the liquor bar, which was sometime after 12:30, I should judge, by the time they counted up their money and left.

Q. Did this defendant or did he not reenter the liquor room from the time you describe until the time you left?

A. Not on that particular night.

Mr. Davis: I believe that is all of this witness. May I interrupt before you commence? Do you have any objection to Mr. Mallory, the chemist, being excused?

Mr. Klein: No, none at all.

Mr. Davis: May the witness Mallory be excused?

The Court: Very well.

Cross Examination

By Mr. Klein:

Q. You state your name is McGuire?

A. That is correct, sir.

Q. And you have been an agent for some fifteen or twenty years?

A. Approximately twenty years.

Q. And you state that you first went to the premises at 988 [25] Sutter Street, the Star Dust Bar, which is at the corner, there——

A. The bar is at the corner of Larkin and Sutter Street, yes, sir.

Q. Is that the correct number?

A. I didn't see the exact number of the Star

(Testimony of Thomas E. McGuire.)

Dust Bar. I am not familiar with it. It is the northeast corner of Sutter and Larkin Street.

Q. You do not know the number?

A. I am not altogether certain of the number, no sir.

Q. You state that you were in this observation room and the storage room of this apartment house from January 5th for about six or eight weeks, is that right?

A. I would judge that would be correct, yes, sir.

Q. On this date you went there at about 4:00 p.m.?

A. On January 10th?

Q. Yes.

A. Yes, sir.

Q. When you went there did you go there alone or in company with somebody?

A. On that occasion, if I am not mistaken, I believe I went alone, because of other work.

Q. So at 4:00 p.m. on January 10th you went to the storeroom of that building alone, is that correct?

A. I went in by myself, yes, sir. [26]

Q. How long were you in that storeroom alone?

A. I didn't say I was alone, Counsel. I was——

Q. You went in about 4:00 p.m.?

A. Alone, yes, but I joined Mr. Hays, Mr. Grady, and Mr. Briscoe, who had already been there.

Q. Hays, Grady and Briscoe were there already, is that right?

A. That is correct.

Q. And in that storeroom were there any seating facilities?

A. Oh, yes, we had all kinds.

Q. What?

(Testimony of Thomas E. McGuire.)

A. Well, for instance the chair I was sitting in was a luxurious living room settee.

Q. One of these Chesterfields, Mr. McGuire?

A. My best description would be it was a single—it could be a Chesterfield seat. I am not familiar with the exact name of it. It was just a single seat. It was not a sofa.

Q. Would you be good enough to tell the ladies and gentlemen of the jury whether the seating part of it was close to the floor, or how far from the floor was it, if you know?

A. I could only describe it as in the same comparable situation as what I am sitting in now. I would say this seat is 2 feet from the floor, 25 inches from the floor.

Q. Are you familiar with living room Chesterfields. Is that the kind of chair you refer to?

A. It is pretty much standard, yes. [27]

Q. Some of them, you know, are very close to the floor and some of them are built a little higher.

The Court: I always though a Chesterfield was a couch.

Mr. Klein: Yes.

The Court: He says this was a chair.

Q. (By Mr. Klein): A lounging chair.

A. It was a chair, your Honor, yes sir. That is more my term.

Q. (By The Court): No more than one person could sit in it?

A. No, just one person.

(Testimony of Thomas E. McGuire.)

Q. (By Mr. Klein): Was it an upholstered chair?

A. It had light upholstery on it. It wasn't—maybe we are at cross purposes. I can solve the purpose for you. It was not a matching set with a sofa. It was an individual chair; more or less, as I have heard it expressed, as a pullet chair.

Q. May I observe the chair you are sitting on?

A. It was more or less similar to this, except it had a little bit of upholstery on it.

Q. And you would say that the seating part of it was approximately the same distance from the floor as the chair in which you are now sitting, is that right?

A. I would say that that is so. It is a standard chair, similar to most every chair that I have sat in.

Q. When you came in there did you sit down in that one chair?

A. Part of the time. I was there two, three, or four or five hours. I was up and down a good bit.

Q. You stated before to us that you came there at four o'clock and did not leave there until 12:30?

A. Barring the time that I went to have something to eat.

Q. You went to eat at 6:30 and returned at 7:15?

A. Approximately, yes.

Q. So you were there more than four or five hours, weren't you?

A. That is correct. I have spent many hours there.

(Testimony of Thomas E. McGuire.)

Q. On this occasion you were there more than four or five hours?

A. Yes, if you judge it by the hour, I was.

Q. During the period of time that you say you came into that place, did you have access to the part outside the storage room—Mr. McGuire, did you have access or did you go into the other portion of the basement of this building from the storage room?

A. I remained—let me observe what you mean.

Q. Here is the storage room (indicating on the diagram). A. Yes, sir.

Q. Tell the ladies and gentlemen of the jury how you got into the storage room.

A. As a matter of fact, these windows in the back we used to gain entrance into it, only because this leads from an areaway, and by not using this door we avoided detection in going in.

Q. I did not ask you that. Just tell us how you got in there. You got in through the window?

A. Through the window on this particular occasion.

Q. Did you ever come into this portion of the basement, having [29] reference to the place in front of the liquor store room, and the other part of the basement leading from the bar? Were you ever in there?

A. I was to this door, only. I was never actually in the Star Dust Bar, but I was from this door completely throughout the basement, but not on that date.

(Testimony of Thomas E. McGuire.)

Q. Did you ever measure that store room? Did you measure that with a tape?

A. I did not, no, sir.

Q. That is purely an approximation, is that right?

A. That is what I qualified it with.

Q. So that if the actual measurements would develop the fact that they were somewhat different, the actual measurements would control, inasmuch as you did not make any actual measurement, yourself, is that right?

A. No, sir, it is approximate.

Q. Were you ever in the liquor room to measure that? A. No, sir, I was not.

Q. So that as far as you are concerned, your idea of what the liquor room is and the measurements of it is based entirely upon what you saw through the peepholes and your approximation of measurements, is that right?

A. That is correct.

Q. Having in mind, and permit me to call your attention to your peephole No. 1—may I get my magnifying glass? I am [30] getting to that stage of life when my eyes are going back on me. I need additional glasses. Will you be good enough to give me your attention here? When you were sitting at the hole No. 1—— A. Yes, sir.

Q. And that is the one that had a view of the portion of the basement outside of the liquor room—that is right, isn't it? A. Yes, sir.

Q. Peephole No. 1 was how far from the floor?

(Testimony of Thomas E. McGuire.)

A. I never did measure it, but you can see it quite comfortably from where I was sitting. We arranged for that purpose. I would judge it was about 30 inches.

Q. Won't you be good enough to answer my questions without comment? If you did not measure it, say so. You say it was about 30 inches from the floor, peephole No. 1?

A. I would estimate it.

Q. What would you estimate the dimensions of peephole No. 1?

A. I would judge it was—it would be hard to say. It was a ragged hole. I would judge it was at least an inch and a half or two and a half inches.

Q. You say it was a ragged hole. Do you mean by that it was irregular in formation?

A. That is right.

Q. It was not square and it was not round?

A. That is right. [31]

Q. Just some plaster taken out irregularly?

A. That is right.

Q. When you were at peephole No. 1 were you sitting in the chair you have described to us?

A. Well, I have sat there and observed through that peephole. Whether I was in that particular incident, I won't swear to that fact. But I did observe through that peephole. Whether I was actually sitting, I won't say.

Q. When you were at peephole No. 1 on this particular night making this observation, at the

(Testimony of Thomas E. McGuire.)

time you saw Mr. Pitta come into that basement, where were the other agents?

A. I can't answer for all of them. If my recollection serves me, I believe Agent Hays was at No. 2 peephole, but I won't bind him to that.

Q. You did not make any memorandum of that?

A. No, sir, I did not.

Q. This is purely from memory?

A. No, sir, it was within a foot of one another.

Q. I mean, you are talking purely from memory?

A. That is correct, yes.

Q. And peephole No. 2 is how far from the floor?

A. I would say peephole No. 2 was—you could see it quite comfortably from standing, and I would say it was about 5 foot 5, 5 foot 3.

Q. What were the dimensions of peephole No. 2?

A. Well, that was likewise like peephole No. 1. It was a ragged hole, I would say from 2 to 3 to 4 inches. It could be any of that dimensions.

Q. What agent did you say was at peephole No. 2?

A. If I recall correctly, I would say it was Agent Hays. Now, I could be mistaken on that.

Q. In your observations you made no memorandum as to what agent saw what?

A. No, I am testifying for what I saw.

Q. Were you the chief in charge there?

A. No, sir, I was not. We were all narcotic agents working together under the district supervisor's directions.

(Testimony of Thomas E. McGuire.)

Q. Wasn't there someone of you three or four men in charge of the operations at that place?

A. No, sir; on the contrary, there was no one in charge. We were all narcotic agents working together.

Q. Didn't you make any written memorandum?

Mr. Davis: I object, your Honor. The question has been asked and answered five times now about written memoranda.

Mr. Klein: This is the first time, if it please the Court.

The Court: He said he spoke from memory.

Q. (By Mr. Klein): You came here on January 10th at 4:00 p.m., is that right?

A. Yes, sir—came where? You mean in the baggage room?

Q. Yes. [33]

A. Yes, sir, I was in the baggage room.

Q. It was, you say about 10:30 that you saw two men come in from the bar into this room, is that right?

A. That is right.

Q. When I say "this room," I mean the part outside the liquor room and outside the store room, this part here (indicating)?

A. That is correct.

Q. Who came in first, do you recall?

A. No, I couldn't. I won't swear to who came through first.

Q. But when they did come, you did see Mr. Bruno take out the key to the liquor room, is that right?

A. That is correct.

(Testimony of Thomas E. McGuire.)

Q. You likewise saw Mr. Bruno take out something from the beer cases that were piled up along the hall, here. Let us see if we can get their location. Right here we have the beer cases, right?

A. That is correct.

Q. Were these beer cases immediately adjacent to the door of the liquor room?

A. That is correct.

Q. And were these beer cases piled from the floor clear to the ceiling?

A. I won't say to the ceiling. They were piled 4 to 6 cases in height.

Q. Weren't they piled to a height taller than the average man? [34]

A. They were not over my head, if I recall correctly, Counsel. I would say they were four to six cases, allowing 12 to 14 inches a case.

Q. Wasn't there more than one stack of the beer cases there, or was there just one stack?

A. At the door I believe there was just one stack of cases, but they were adjoining others.

Q. Right there, Mr. McGuire, isn't a fact that the width of those cases was at least two or three cases in width? Isn't that right?

A. In other words, there were about three or four stacks of them.

Q. Yes, immediately adjacent to each other?

A. That is right.

Q. You say that Bruno put his hand at some place as he came in?

A. While he had opened the door, he opened up

(Testimony of Thomas E. McGuire.)

the space between two of the beer cases and withdrew the bindle that I have mentioned.

Q. Mr. McGuire, you refer to a bindle.

A. Yes, sir.

Q. Mr. McGuire, will you be good enough, so that we may have an idea, to tear that to about the size and shape of a bindle (handing a piece of paper to the witness).

A. It is usually straighter (demonstrating). The manner in which we folded our bindle was approximately in this manner. [35]

Q. I did not get that. Just what did you do?

A. The manner in which we folded our bindle——

Q. I am not asking that. I am asking about this particular bindle that you saw this man take from those beer cases. That is what I am interested in.

A. As I said, it had this long peculiar fold, and I will make an effort to fold it in that manner. This should be torn off straighter.

Q. If that paper is too large, please reduce it to about the size you think it was.

A. I am making an effort to fold it exactly the way—now, this is not as well folded as it could be or would be ordinarily. This is supposed to fit. That is rather crudely done, but that is the method in which it is folded.

Q. That is the type of—— A. A bindle.

Q. Of a paper that you call a bindle; that is commonly referred to as a bindle of heroin?

A. Yes, sir, that is how it is folded.

Q. Are you the one that went to this bindle

(Testimony of Thomas E. McGuire.)

sometime that afternoon and took out some substance?

A. No, sir, Mr. Grady took it out on that particular date.

Q. In your presence? A. Yes, sir.

Q. At that particular time? [36]

A. At 7:30 that night, yes, sir.

Q. That was about three hours before these two gentlemen came from the bar, is that right?

A. Yes, sir.

Q. You say it contained about one gram?

A. I didn't say how much it contained. You mean how much was in the bundle when Mr. Gray obtained it?

Q. Yes.

A. I would say it was approximately a dram of heroin at that time.

Q. How much would you say a dram was, so we can get that idea clearly?

A. A dram was sold.

Q. I am not asking you what was sold, now; I am asking you in quantity. A. In quantity?

Q. Yes.

A. Eight of them would be an ounce.

Q. Eight drams would be one ounce?

A. Yes.

Q. So that the amount of material—let us refer to it that way—would be just a few scatterings of something like flour, would it not?

A. Well, it is like flour, but the few scatterings, it would still be a dram, counsel, 50 grains or approximately 60 grains, [37] as you choose to call it.

(Testimony of Thomas E. McGuire.)

Maybe a few scatterings, but per se, in itself, it would be quite a lot.

Q. Yes, you say 8 of these——

A. Would make a full ounce.

Q. And as this man came from the bar you say he put his hand in between the beer barrels and took out this paper that you had had under observation? A. The beer cases, yes, sir.

Q. Did you have this under observation from 4:30 until 10:30?

A. No, sir, I did not. I couldn't see it when it was in its place of concealment, Counsel.

Q. Did you have the place of concealment under observation continuously?

A. Looking out through the openings, I did observe that place as readily as I did the rest of the hall. I couldn't say I observed that one particular spot, but I do know this, Counsel, that that was not disturbed only on the occasions in which I seen it disturbed.

Q. You were at dinner from 6:30 to 7:15?

A. That is the only time. I couldn't answer that during that time.

Q. You can't answer for what happened——

A. No, sir.

Q. Won't you permit me to ask my questions? I do not want to disturb you, either, in your answers. So that from 6:30 to [38] 7:15 you do not know what, if anything, happened to that so-called bindle?

A. No, sir, I have no knowledge of it.

(Testimony of Thomas E. McGuire.)

Q. When this man Bruno came in and took that bindle and opened the door, Mr. Pitta did not have the keys to the door, did he?

A. I couldn't answer for that, Counsel.

Q. Didn't you tell the ladies and gentlemen of the jury that it was Bruno who opened the door?

A. That is correct, I said that, but I do not know whether Pitta had a key for that door, or not.

Q. Let us put it that way: He did not insert any key in that liquor room to open that door?

A. The defendant did not, no, sir.

Q. And Mr. Pitta did not put his hand in the vicinity of the place of concealment of that bindle?

A. No, sir, I did not see him do that on any occasion.

Q. You were looking there at that time, weren't you?

A. Yes, sir, I was.

Q. So that he did not put his hand there and had nothing to do with the opening of the door. They went into the liquor room, is that right?

A. That is correct.

Q. They stayed there, according to your statement, about three or four minutes?

A. I would say not much more than five minutes.

Q. You have described the size of the liquor room. Can you give us any additional description of that room?

A. In what manner, Counselor? There was a shelf around it and liquor stacked around it.

Q. Let's see. Here is where your peepholes are, peepholes 1 and 2, and then you have 3, 4 and 5.

(Testimony of Thomas E. McGuire.)

They appear very close together there, don't they?

A. On that drawing they do, yes, sir.

Q. As a matter of fact, they are about one shelf apart. There is shelving alongside this wall, isn't there?

A. Yes, sir.

Q. Isn't it a fact that the shelves are about 33 inches deep?

A. I do not know. I never did measure them, but I will accept your word.

Q. You never, from your peephole when you were there—nobody who was there inserted a ruler through there so you could get the measurement of the width of that shelf, is that right?

A. I did not do that, counsel.

Q. Isn't it true that these shelves ran clear up along this wall with divisions right along—in other words, there was shelving clear from the floor right up, isn't that right?

A. Not that you could notice from the baggage room, counselor. I will accept your word that they were there. They might be. I don't know. You couldn't see them from the baggage room. [40]

Q. Did you see anything on those shelves as you looked through these peepholes?

A. Oh, yes.

Q. What did you see?

A. Whiskies, wines and liquors.

Q. Were there any bottles in the shelves at the exact location of these peepholes?

A. Well, counselor, I will try to explain it in this respect, that the holes were four to eight inches;

(Testimony of Thomas E. McGuire.)

the size looking into the liquor room I would judge these holes were from $3\frac{1}{2}$ to 4—three and a half by 8 inches.

Q. You think that is a fair measurement, $3\frac{1}{2}$ by 8?

A. I will accept it. In my best recollection and knowledge I believe that is the approximate size. We specifically mentioned that while we were in there observing it, and I do know this: I put four fingers on top of one another in several of them, and I was able to do it.

Q. If I were to tell you that they were about three and a half inches square, that I measured them, would that refresh your recollection?

A. I would rather trust to my own recollection on it, Counsel, because we talked about it a good bit at the time.

Q. We will give you a chance to measure it. I think we will go up there together.

A. Thank you. [41]

Q. Let me ask you this: Isn't it a fact that these shelves along the wall where these people were, were all filled with bottles of liquor, the ordinary size of a quart whiskey bottle?

A. I will not say that, Counsel.

Q. May I show you a photograph of what I have described as peephole No. 1 and ask you whether it is not true that the peephole is located clear to the top of this shelving? Isn't that a fact? Does that described that peephole?

A. I can't answer for that, counselor, and I

(Testimony of Thomas E. McGuire.)

won't bind myself to any answer in that respect, because now you are asking me to describe the peephole from this side, whereas I have been looking at it from that side. Now, what is on the other side of the peephole I can't tell you. I do know that my view was not obstructed by any bottles at most positions that I was in there.

Q. Mr. McQuire, will you be good enough just to answer my questions, and I will ask that the last part of the answer be stricken, if it please your Honor. We will develop that fact and let the jury determine whether or not his vision could or could not be good.

The Court: I do not think the answer should go out. He explained to you why he could not describe the peephole on this side, because he did not look from that side. That is what the witness said. [42]

Q. (By Mr. Klein): Let me ask you this: In looking at this peephole——

A. I won't answer that that is the peephole, counsel.

Q. Pardon me. You won't answer whether this is a peephole? A. I can't say that it is.

Q. You do not know that that is a peephole?

A. I can't say that it was, Counsel.

Mr. Davis: I object to this, your Honor.

Mr. Klein: I ask that this photograph be marked for identification as Defendant's Exhibit A, if it please the Court.

(The photograph displayed to the witness

(Testimony of Thomas E. McGuire.)

was thereupon marked Defendant's Exhibit A for Identification.)

Mr. Klein: Let me show you another portion of that same wall, Mr. McGuire, purporting to be a photo of a merchandise shelf, showing peepholes in that place. Does that mean anything to you in the shape of that?

A. No, counsel, I cannot truthfully answer that. That has no bearing whatsoever from the wall I was looking at—in fact, it could be. I will not dispute your word on it, but I would like to see it.

Mr. Klein: I will ask that this be marked for identification as Defendant's Exhibit B.

(The photograph in question was thereupon marked Defendant's Exhibit B for Identification.) [43]

Q. (By Mr. Klein): May I show you likewise another photograph, showing the floor and the ceiling and all of the peepholes there, and ask you whether that means anything to you.

A. I cannot see any peepholes in this—just a moment. Pardon me, counsel. Maybe it is my fault. I see no peephole in that picture, counsel.

Mr. Klein: I ask that this be marked for identification as defendant's next in order.

(The photograph in question was thereupon marked Defendant's Exhibit C for Identification.)

Q. (By Mr. Kline): Do you recognize this photograph as being a photograph showing the

(Testimony of Thomas E. McGuire.)

entrance to the liquor storeroom through this door, and this pile of cases there? Is that about the way it looked to you?

A. Yes, sir, that is apparently the entrance from the liquor store and the entrance to the storeroom, the bar and the storeroom.

Q. And it shows the pile of beer cases there, is that right?

A. Now, for your benefit, counselor, there are two different types of beer case. This is the beer case I have reference to. These are the small bottles, the midget size. These are the larger size. I said it was between the third and fourth cases.

Q. But there were several stacks of beer cases along the wall [44] adjacent to this door?

A. But no small ones. If my memory serves me correctly, there were no small ones at that time. I think it was only these large ones.

Q. Large beer cases? A. Yes.

Mr. Klein: I ask that this be marked for identification as Defendant's Exhibit next in order.

(The photograph in question was thereupon marked Defendant's Exhibit D for Identification.)

Q. (By Mr. Klein): Mr. McGuire, when you look through these peepholes on the portion of the wall adjacent to the liquor room, you have told us that there was shelving there; that you know, is that right?

A. There was shelving. I could see the bottles.

(Testimony of Thomas E. McGuire.)

Q. And isn't it true that those shelves were all filled with liquor bottles?

A. Well, relatively speaking. There were liquor bottles there, but I will not qualify it and say it was filled. There were liquor bottles there. I could observe them, and we could tell you they were there, and I could see bottles, but they were not all filled, if that is what you mean, counsel.

Q. Isn't it a fact that as you looked through this peephole, with the shelving 33 inches wide, and the location of the peepholes as they were, isn't it true that your vision coming out [45] was obstructed by the 33 inches of shelving?

A. It is hard to describe, other than to say that there might have been a neck of a whisky bottle somewhat similar to that lamp on that desk, which I could plainly see. However, it did not obstruct my view from seeing them, which was over it. That is the only way I can explain it.

Q. I am asking you this, Mr. McGuire: Looking through that peephole with the 33-inch deep shelf there, and the location of that peephole the way it was, isn't it true that your vision looking straight across the room was confined only to a certain portion of that liquor room?

A. It was not, counselor. I will swear that I could see above the tops of the whisky bottles unobstructed across the room of that liquor room, if that will help the question.

Q. Could you see the faces of the men in that

(Testimony of Thomas E. McGuire.)

room if they were standing there, through the peephole?

A. At certain peepholes I could see from their waist up, and I could see from their pants' pockets up.

Q. Up how high?

A. I could see to their faces.

Q. Did you see their faces?

A. Oh, yes, on numerous occasions. I not only seen their faces when I was standing, I likewise saw their faces while they were sitting. They were sitting on the beer cases and liquor cases that were in there. [46]

Q. Mr. McGuire, will you be good enough to confine yourself to my questions? I am asking you about the evening of January 10th, when these two men came in there about 10:30 that night; did you see the faces of these two men?

A. Yes, sir, I can swear that I saw the defendant's face, enough of it that I could know him. I knew him previously. I can swear to that. I mean I saw the man known to me as Vince Bruno.

Q. At that particular time?

A. At 10:45 on the evening of January 10th.

Mr. Klein: If it please your Honor, before we get through with this matter I am going to ask your Honor, the jury and the witness, to come out and view the condition that exists there, so we can definitely state it is just as it existed on January 10th, so the jury may determine that very fact.

The Court: I will determine that later. I do not

(Testimony of Thomas E. McGuire.)

take juries to see places where events took place unless it is absolutely essential, because too much error can result from that. It is very rare. It may be that it might be necessary, but let us hear the evidence first.

Q. (By Mr. Klein): Mr. McGuire, you say that Mr. Pitta and this *may* stayed in there a very few minutes and had no conversation, is that right?

A. Yes, sir, they did have a conversation.

Q. They talked very little? [47]

A. They had conversation.

Q. And you saw Mr. Bruno open the bindle and take some on a knife, and what did he do with it, did you say?

A. He took it on the blade of a knife and placed it to his nostrils, and took deep inhalations of the white substance until it disappeared from the blade of the knife into his nostrils.

Q. Both nostrils? A. Both nostrils.

Q. Then what happened?

A. He passed the paper and the knife to the defendant Pitta and he likewise did the same motions. He took a little bit of the white substance on the blade of the knife, placed it to his nostrils, took a deep inhalation, and the white substance disappeared in his nostrils, in both nostrils. He did it repeatedly.

Q. And the only time you saw the defendant Pitta have actual possession of that so-called bindle was at this particular time when Bruno handed it to him and he took the small particle on the edge

(Testimony of Thomas E. McGuire.)

of the blade and then gave it back to him after sniffing, is that right?

A. He took it on the blade of the knife. It was not a small particle, per se; it was, I should judge, from my experience with it, a quarter of a grain or a half a grain of substance.

Q. Let us get some idea of what you call a quarter of a [48] grain. Would you step up to the blackboard here with a pencil and draw what you think is a quarter of a grain?

A. Of heroin?

Mr. Davis: If the Court please, I am going to object to that.

The Court: I do not think anybody can draw a grain.

Mr. Klein: We want to have some idea. He said manifestly it is a large amount.

Mr. Davis: Give him something similar to it and let him portion it out.

The Court: You can't draw a grain on the blackboard.

Mr. Klein: I just want the jury to get some idea of what it is.

The Court: Ask him.

Q. (By Mr. Klein): What is a quarter of a grain, Mr. McGuire?

A. I have explained it in court in this manner, that it was approximately the ash that is left on a cigarette after it has burned for a few minutes, that is, around the circumference, around the ash, on the edge of a cigarette after it has burned.

(Testimony of Thomas E. McGuire.)

Q. Burned for how long?

A. I should judge a quarter of an inch or three-eighths of an inch.

Q. That is what you call a quarter grain?

A. That in heroin could be weighed to approximately a quarter of a grain or half a grain. [49]

Q. Pitta handed it back to the other man? He handed the bindle back, is that right?

A. He repacked the bindle in the manner he had it formerly.

Q. And they left the room together?

A. That is right.

Q. And Bruno locked the door?

A. That is correct.

Q. And Bruno placed the bindle in the place where you had *served* it before, is that right?

A. That is correct.

Q. And Pitta went away?

A. Both re-entered the bar.

Q. Pardon?

A. Both re-entered the bar.

Q. You do not know how long Pitta stayed there?

Mr. Davis: I object to that, your Honor. He said he entered the bar.

Mr. Klein: He stated before he did not leave until 12:30 and made sure everybody left.

Q. You did not know Pitta was in the bar—let me put it that way.

A. I would have to recount what I overheard there.

Q. Let me ask you this: You do not know from

(Testimony of Thomas E. McGuire.)

your own personal knowledge that Pitta was in that bar?

A. I couldn't swear to that fact, no, counsel. [50]

Q. Let me ask you this: When Mr. Pitta and Mr. Bruno were in that room, isn't it a fact that Mr. Bruno gave Mr. Pitta about a dozen bottles of Scotch whisky?

A. Mr. Pitta received—No, sir.

Q. Yes?

A. No, there was no whisky given whatever.

Q. You definitely know that?

A. I am swearing to that fact.

Q. You are swearing to all the facts you testify to, aren't you? A. Yes, sir, I am.

Q. Mr. McGuire, there are no chairs in that liquor storeroom, are there?

A. I do not recall seeing any.

Q. You had it under oservation for eight weeks?

A. I didn't see any.

Q. These two men were standing on their feet during those three or four minutes they were in that place?

A. No, sir, if I remember correctly the defendant was standing on a beer—or a little box or case.

Q. What?

A. He was sitting on something. He was down lower than he would be if he were standing. I seen him standing and I seen him sitting.

Q. When did you recall that?

A. I don't think I ever said different. [51]

(Testimony of Thomas E. McGuire.)

Q. You did not tell that to Mr. Davis on direct examination, did you?

Mr. Davis: I object to that question, your Honor. Perhaps the question was not asked.

Mr. Klein: I will withdraw it.

Q. What causes you to remember now that he was sitting?

The Court: You just asked him that, if I remember right.

Mr. Klein: Yes, I asked him what caused him to remember that, if it please the Court.

Mr. Davis: You asked him; that is why.

The Court: Go ahead.

A. You asked me about the chairs, and I do know that on numerous occasions they sat on the whisky boxes and I have said in my memory they sat on the whisky box on this particular instance.

Q. (By Mr. Klein): You remember that. The point I am asking, Mr. McGuire, what recalls that definitely to your mind, that on this particular occasion there was a whisky box there for him to sit on?

A. Well, you mentioned the fact of whether the chairs were there, and then I said there were whisky boxes which they did use, and then that brought out the fact that he was sitting on the whisky box.

Q. When you say "whisky box," do you mean one of these small cases containing 12 bottles of whisky? [52]

A. That is correct.

Q. And he was sitting low on one of those cases?

A. He was sitting on one, counsel.

(Testimony of Thomas E. McGuire.)

Q. Do you know whether there was one, two, or three in that batch he was sitting on?

A. I couldn't answer how many he was sitting on, but he appeared to be sitting on one. There might be two there, I am not sure.

Q. Was it a case containing whisky or was it one of these cardboard boxes?

A. I couldn't answer that, counselor. It appears to me to be a whisky box, because they had whisky cases in there, and I seen them open whisky cases, and I presumed it was whisky cases.

Q. And that is why you presumed, because you had seen them in there, is that right?

A. Oh, yes, and I seen them opening them, and I seen them withdrawing whisky from them.

Q. And you say they were large wooden cases?

A. They were the standard size cases that I had seen whisky bottles, quart bottles in.

Q. Mr. McGuire, neither the ladies and gentlemen nor I know what you mean by standard size. Will you please explain that?

The Court: I am not so sure that we are so completely ignorant on that subject.

Mr. Klein: Well, your Honor, my idea on that is that [53] from time to time I have been in a wholesale house and they are nothing but cardboard containers. They are not wooden cases.

The Court: I think you are mistaken about that, Mr. Klein, but you ask the witness.

Q. (By Mr. Klein): Did you see wooden cases in there?

(Testimony of Thomas E. McGuire.)

A. Yes, sir, I seen them opening the wooden cases, and the beer cases there were wooden cases.

Mr. Klein: That is all.

Mr. Davis: That is all.

The Court: We will take the afternoon recess at this time, ladies and gentlemen of the jury. I will ask you to bear in mind the admonition that I have already given you, that you cannot talk among yourselves or with anybody else about this case, or form or express any opinion until the case is finally submitted to you.

(Recess.)

The Court: The jurors are all present. You may proceed.

Mr. Davis: Call Mr. Grady.

WILLIAM H. GRADY

called as a witness on behalf of the Government;
sworn.

The Clerk: State your name to the court and jury.

A. William H. Grady. [54]

Direct Examination

By Mr. Davis:

Q. Mr. Grady, what is your occupation, please?

A. I am an agent of the Federal Bureau of Narcotics.

(Testimony of William H. Grady.)

Q. How long have you been engaged in that occupation? A. Approximately five years.

Q. Directing your particular attention to the methods——

Mr. Klein: Pardon me, Mr. Davis. Was this man sitting in the room?

Mr. Davis: He is the agent-in-charge, and who, with the court's permission, remained, as is our custom.

Mr. Klein: The agent in charge of this investigation?

Mr. Davis: Yes, the agent who assists me in the presentation of the case. He is one witness, if you will recall, whom I asked the court to permit to remain, and the court so permitted.

Q. Mr. Grady, directing your particular attention to the months of January and February, 1946, were you familiar with the premises known as the Star Dust Bar? A. I was.

Q. Were you present there on various occasions in a storeroom from which you could observe the liquor room and also the hallway of the premises?

A. Yes, sir.

Q. Directing your particular attention to the 10th day of January, 1946, were you there upon that day? [55] A. Yes, sir.

Q. Directing your particular attention further to 7:30 on that evening, were you present there then? A. Yes, sir.

Q. What, if anything, did you do at 7:30?

A. At that time I left the storeroom and entered

(Testimony of William H. Grady.)

the hallway and removed a bindle or a package from between the third and fourth beer cases in a stack of beer cases in an outside hallway, alongside the door of the liquor room.

Q. What, if anything, did you do with that bindle?

A. I returned to the storeroom with that package and in the presence of Agents Hays and McGuire and Briscoe I took a sample from that package, or took a portion of the package and then refolded the package and returned it to the place that I had originally found it.

Q. I show you Government's Exhibit No. 1 for purposes of identification, and ask you if this is the package in which you put the sample which you removed from the bindle which you testified you took from between the beer cases?

A. Yes, sir.

Q. Did you place your initials on there at that time?

A. Yes, sir.

Q. Do you observe them on here now?

A. Yes, sir.

Q. What did you do with this package after you had taken the sample from the bindle and put it in here? [56]

A. I gave this package to Agent Briscoe.

Q. When did you give it to him?

A. On the 15th.

Q. Was it in your possession from the 10th, when you took it, until the 15th?

A. Yes, sir.

(Testimony of William H. Grady.)

Q. Directing your further attention to 10:30 on that evening, were you there at that time?

A. Yes, sir.

Q. What, if anything, did you observe at that time?

A. At that time I saw the defendant Pitta and Vincent Bruno come to the storeroom. I saw Vincent Bruno remove a package—the package of heroin from which this package was taken—from between the fourth and fifth beer cases. I saw Bruno and Pitta use the narcotics, use the heroin that was in the package, using a small pocket knife. They used it in such a manner—Bruno first opened the bindle, placed a small quantity of heroin on the end of a knife, and then drew the powder up into his nostrils. It was a powder, white, with a slight brownish cast. I then saw him hand the knife and the package to the defendant, Joe Pitta, and I saw him use it in a like manner.

Q. At which peephole were you standing when you could see into the storeroom?

A. I was at the peepholes looking into the liquor room. That [57] is the peepholes referred to as 3, 4, 5, and 6, on the map, the last four.

Q. How long would you estimate that the defendant and Bruno remained in there?

A. It is sometimes difficult to judge time, but my recollection of it at this time is from five to ten minutes.

Q. Did you look through one peephole at that time, or did you look through more than one?

(Testimony of William H. Grady.)

A. No, I looked through more than one.

Q. Was the defendant Pitta standing or sitting at the time that this transaction took place?

A. It is my recollection that Pitta was sitting and Bruno was standing.

Mr. Davis: I believe that is all.

Cross-Examination

By Mr. Klein:

Q. Mr. Pitta, you say you have been with the Department about five years?

A. Yes, sir.

Mr. Davis: Pardon me. This is Mr. Grady.

Mr. Klein: Mr. Grady. Pardon me.

Q. You started on this investigation about January 5th?

A. Yes, sir. Well, on this particular investigation in the Star Dust, these people had been——

Q. Won't you please answer my question? Did you start on this investigation about January 5th? If that is not so—— [58]

A. Well, define "investigation," counsel.

Q. Pardon me?

A. Could you define the investigation you are referring to? You say "this investigation."

Q. You investigated the Star Dust premises—I will withdraw that. When were you assigned to observe the Star Dust premises?

A. That was on January 5th.

Q. How long were you on that assignment?

A. Until approximately March 1st or March 2nd.

(Testimony of William H. Grady.)

Q. Who was assigned to that duty with you?

A. There were numerous agents. I believe there were probably ten agents that worked on this investigation.

Q. Did you make any written memoranda of your observations?

A. They were contemporaneous memoranda made at the office the next day.

Q. How do you recall what happened on January 10th?

A. Well, naturally, I refreshed my memory from the notes in our office.

Q. From the notes that you made, is that right?

A. Yes.

Q. Do you recall what time of day you went to the premises?

A. My recollection and my notes indicate that I went there at two o'clock that day.

Q. Two o'clock in the afternoon? [59]

A. Yes, sir.

Q. Was there any other agent in the premises at that time?

A. I believe Agent Briscoe was there with me.

Q. You and Agent Briscoe were there from about two o'clock on, is that right?

A. Yes, sir.

Q. About what time is it that you state you took this sample from this so-called bindle?

A. At 7:30 p.m.

Q. Did you have that likewise in your memorandum? A. Yes, sir.

(Testimony of William H. Grady.)

Q. You are now giving us your recollection after having read your memorandum and refreshed your recollection, is that right?

A. I am testifying from my memory with the recollection I could obtain in relation to instances that happened.

Q. You were not there when that bindle was placed in that particular place, were you?

A. Do you mean when the bindle was put under the beer cases?

Q. Yes, the first time.

A. Do you refer now to the 5th of January as they were changing bindles?

Q. I am asking you when this particular bindle, this one I am referring to now, was put in that particular place? A. I don't believe so.

Q. You do not know that? [60] A. No.

Q. On this 10th day of January, about 7:30, you went there and you saw some bindle, you brought it back into the storeroom of that building, and took a sample, is that right? A. That is correct.

Q. And you gave that sample to Agent Briscoe?

A. Yes, sir.

Q. What did he do with it?

A. He delivered it to the chemist.

Q. Were you with him and the chemist?

A. No, sir.

Q. At that particular time you gave it to Briscoe, is that right? A. Yes, sir.

Q. That was on January 10th?

A. January 15th.

(Testimony of William H. Grady.)

Q. Did you give it to him on January 15th?

A. Yes, sir.

Q. Did you take that sample on January 15th?

A. No, sir, I took the sample on January 10th.

Q. When did you deliver it to Briscoe?

A. On the 15th.

The Court: He said on the 15th.

Mr. Klein: I misunderstood him, if the Court please.

Q. From the 10th to the 15th, where was it?

A. It was in my custody. [61]

Q. When you say in your custody, where was it?

A. Well, part of the time it was in my billfold.

Q. And the other part of the time?

A. The other part of the time it was in my desk in the district office at San Francisco.

Q. And that desk——

A. It is a private desk that there is no entrance to by anybody except myself.

Q. Why do you say that?

A. For the reason that I am the only one who has the keys to it.

Q. And no other keys to that desk?

A. Not that I know of.

Q. You gave it to Briscoe on the 15th?

A. Yes, sir.

Q. But you did not go with him to the chemist, is that right? A. No, sir.

Q. Is that right? A. That is right.

Q. About 10:30 you saw these two men come

(Testimony of William H. Grady.)

from the bar into the hallway there adjacent to the bar, is that right? A. Yes, sir.

Q. At what peephole were you standing at that time?

A. I was on the inside. I didn't see them until they entered.

Q. Then you did not see them enter at all, is that right?

A. I didn't see them in the hall, counsel. I saw them as the door opened. [62]

Q. What door?

A. The door to the liquor room.

Q. Isn't that hall and the door to the liquor room just one part of the room? A. Yes.

Q. What peepholes were you at when you observed them at that location?

A. To the best of my recollection it was peephole 4 or 5. It was in the inside, in the liquor room.

Q. Mr. Grady, isn't it a fact that the only peepholes that anyone could observe a person entering the hall from the bar was either peephole 1 or 2?

A. Yes, sir, that is correct.

Q. What peephole were you at, did you say?

A. Either 4 or 5.

Q. So that when they came in from the bar you did not see them enter that hallway?

A. I saw them enter the liquor room, counsel.

Q. I did not ask you that. Please answer my question.

Mr. Davis: I object to the question. The ques-

(Testimony of William H. Grady.)

tion has been answered four times: "I did not see him in the hall."

Mr. Klein: I beg your Honor's pardon. I am sorry, Mr. Davis.

Q. So you did not see Bruno or anybody take any bindle from the beer cases? [63]

A. Yes, sir, I did.

Q. You did see them? A. Yes, sir.

Q. Isn't it a fact that the door to the liquor room was locked?

A. Yes, sir. It was locked until Bruno opened it or somebody opened it. I do not know whether Bruno opened it, because I didn't see him.

Q. Then what happened?

A. As the door opened, Bruno stooped down and took the bindle out from between the third and fourth beer case from the bottom. Then he walked in and Pitta was right behind him.

Q. You are telling the ladies and gentlemen of the jury that at that time you were at peephole 4 or 5, is that right?

A. Yes, sir, that is correct.

Q. How long had you been on that assignment at that time, Mr. Grady?

A. What assignment do you refer to, Counsel?

Q. The assignment you tell us you were assigned to on January 5th.

A. Oh, you mean the particular investigation of the Star Dust Bar?

Q. Yes. A. Since the 5th.

(Testimony of William H. Grady.)

Q. You have been on it continuously?

A. Yes. [64]

Q. During any of the times that you looked through peepholes 3, 4, 5 and 6 did you observe any shelves on the other side of the peephole?

A. Yes, sir.

Q. Did you ever measure the width of those shelves? A. No, sir.

Q. You do not know how wide they are?

A. No, sir.

Q. If I was to tell you that those shelves are about 33 inches wide, would that be a proper—

A. I estimated them at two feet, but if you say they are 33 inches wide, I would not dispute your word.

Q. I measured them today, Mr. Grady. Did you observe in looking through this peephole these divisions for the shelves?

A. What divisions do you refer to?

Q. There is shelving there with vertical boards and cross shelving, isn't that right?

A. Oh, you mean boards in between the shelves?

Q. And the horizontal boards.

A. Yes, there are horizontal boards.

Q. There is a regular shelf there upon which a stock of whisky is carried, isn't that right?

A. Yes, sir.

Q. And these particular peepholes that you have referred to as peepholes 3, 4, 5, and 6, isn't that true, that they are [65] just about on a level and

(Testimony of William H. Grady.)

just below the shelving as it is laid about 36 inches from the floor?

A. I can't say exactly to that. I can say that I could see what was going on in the room.

Q. We will determine that, Mr. Grady. Isn't it a fact that the peephole was just below a cross section of the shelf?

A. No, sir, that is not my recollection of it.

Q. May I show you what has been marked here as Defendant's C for Identification, which is a photograph of shelving, and I call your attention to this portion of the peephole there right above the top of this bottle? Do you recognize that as one of your peepholes?

A. No, I do not.

Q. You do not? A. No, sir.

Q. In looking through the peephole did you see any bottles on any shelves at any time?

A. I could see bottles on the other side, and I could see bottles on the same side I was looking through.

Q. I am not asking you on the other side; I am asking you particularly in front of your view as you were looking through the peephole, you told us there was a shelf there. Now, were there bottles on that shelf?

A. Oh, yes.

Q. There were a lot of bottles?

A. I wouldn't say there was [66] a lot of bottles. I will say there was bottles.

Q. Isn't it true that this peephole is almost——

Mr. Davis: Your Honor, I am going to object to the form of that question, because these pictures

(Testimony of William H. Grady.)

are only in for identification, and the witness has stated he does not recognize that picture as being the peephole he used at that time. Now counsel is using this picture, for which no foundation has been laid, and directing questions to "When you looked through this peephole." We do not admit that that is the peephole.

Mr. Klein: I will promise to connect it, if it please the Court. This is naturally part of our case.

The Court: You mean you had pictures taken at the time this event took place on January 10th?

Mr. Klein: We had pictures taken some time; the photographer will testify when they were taken, Judge.

Mr. Davis: I still object to the form of this question, because the witness said in looking at that picture he does not recognize that peephole.

Mr. Klein: I will withdraw the question.

Q. Mr. Grady, isn't it a fact that the peephole, the top of the peephole was on a level with a cross shelf, cross board running——

A. From your question I would say then you infer that the peephole was on the inside where I could not see anything. [67]

Q. No, I am not inferring that, at all. Here is the shelf, and it is 33 feet deep. A. Yes.

Mr. Davis: Just a minute. I believe counsel has made a mistake. It is 33 inches.

Mr. Klein: 33 inches. Pardon me, Mr. Davis; I thank you.

Q. Isn't it a fact that all of the peepholes were

(Testimony of William H. Grady.)

practically at the place where the cross shelf that was 33 inches wide ran across the vertical shelf?

A. No, sir, that is not my recollection.

Q. That is not so. On that day about 10:30 you say you saw Mr. Bruno and Mr. Pitta enter that room, is that right?

A. Yes, sir.

Q. Who came first?

A. Mr. Bruno, as I recall it.

Q. Mr. Pitta did not reach out and take anything from any beer case?

A. No, sir.

Q. You never saw him do that?

A. No, sir.

Q. They came into the room. What did they do after they entered the room?

A. They were talking, and Bruno sniffed some of the heroin, and then he handed it to Joe Pitta.

Q. You saw that clearly?

A. Oh, yes.

Q. Did you observe the faces of both men during the time they were in there?

A. Well, yes, of course I did.

Q. Were both men standing or sitting?

A. To my recollection, Pitta was sitting. Pitta was sitting in the room to my right. That is my recollection of him at that time.

Q. Bruno was standing, is that right?

A. Bruno was standing.

Q. What was Pitta sitting on?

A. Some type of a case.

Q. What kind? Wooden or cardboard?

A. There are both kinds in there, so I do not know what kind he was sitting on.

(Testimony of William H. Grady.)

Q. What is your best recollection?

The Court: He said he does not know.

Q. (By Mr. Klein): You are sure that there were both kinds of cases in there?

A. There is one in one of your pictures there.

Q. I am just asking you now: Are you sure there were both kinds of cases there? A. Oh, yes.

Q. And then Bruno and Pitta left that room together, is that [69] right? A. Yes, sir.

Q. Did you see who placed the bindle in the beer boxes? A. Yes, sir, Bruno.

Q. Did he place it in there before he shut the door? A. No, as he had the door open.

Q. As he had the door open. And what did he do? Just tell us that.

A. Just reached over, pushed the bindle in between the two beer cases, stood up and walked on.

Q. Did he leave the door open?

A. No, he closed the door.

Q. He closed and locked the door?

A. He closed and locked the door. The door was always kept locked.

Q. Did you discuss your testimony with Agent McGuire today? A. Today?

Q. Yes.

A. I discussed it with Mr. Davis, Mr. McGuire—we always discuss our testimony.

Q. Did you discuss it today? A. Yes.

Mr. Klein: Thank you. That is all.

Mr. Davis: That is all. May I ask if Agent Briscoe has arrived yet? He is coming from out of town. [70]

ELMER A. BRISCOE

called as a witness on behalf of the Government;
sworn.

Q. (By the Clerk): Will you state your name
to the court and jury? A. Elmer A. Briscoe.

Direct Examination

By Mr. Davis:

Q. Mr. Briscoe, what is your occupation, please?

A. I am a lieutenant in the Criminal Division
of the Sheriff's Office at Stockton.

Q. What was your occupation during the months
of January and February, 1946?

A. I was an agent with the U. S. Bureau of
Narcotics.

Q. Directing your particular attention to the
10th day of January of that year, did you have
occasion to be in the storeroom underneath the Star
Dust Bar in San Francisco?

A. Yes, sir, I did.

Q. I will show you this package marked "Gov-
ernment's Exhibit No. 1 for Identification" and ask
you if you have seen this before.

A. Yes, sir, I have.

Q. When did you see that?

A. I have my initials on here, Mr. Davis, and
the date, January 10, 1946.

Q. Do you recall from whom you received this?

A. No, I can't say, Mr. Davis, off-hand. [71]

Q. What did you do with it, if anything, after
you put your initials on it?

(Testimony of Elmer A. Briscoe.)

A. It was marked for identification and then submitted to the United States Chemist for its analysis.

Q. I will show you this envelope marked Government's Exhibit No. 2, Laboratory No. 152,489, and ask you if you have seen that before.

A. Yes, sir.

Q. Is that the envelope in which this package was contained when you delivered it to the chemist?

A. Yes, sir, that is correct.

Mr. Davis: That is all.

Cross-Examination

By Mr. Klein:

Q. Can you tell the ladies and gentlemen of the jury when this little package containing your initials was delivered to you?

A. I believe that package was obtained——

Q. When was it delivered to you?

A. May I see the package again, please? And may I see the other envelope, sir? At 7:30 p.m., January 10, 1946.

Q. That was delivered to you on January 10?

A. Yes, sir. This envelope is in my handwriting.

Q. By whom was it delivered to you?

A. I was working with agents Grady, Hays and McGuire, and we were in the basement of the Star Dust Bar at the time. [72]

Q. Was there any memorandum on this envelope to enable you to tell the ladies and gentlemen of the jury by whom it was delivered to you?

(Testimony of Elmer A. Briscoe.)

A. I believe it was Agent Grady.

Q. Then what did you do with it?

A. I took it to the United States chemist for analysis.

Q. On January 10th?

A. Well, it was possibly the second day—I am not certain. It was marked for identification at 7:30 p.m. It was probably the morning of the 11th that I took it to the U. S. chemist for analysis.

Mr. Klein: That is all.

Mr. Davis: That is all. If the Court please, the Government will move to introduce the exhibits previously marked for identification in evidence and rest its case.

The Clerk: You are referring to Exhibits 1 and 2?

Mr. Davis: Yes.

Mr. Klein: If it please your Honor, I object to the introduction of these exhibits for the reason that it definitely appears from the testimony in this case that the only connection that this defendant had with these exhibits in any way was that at a certain time it was handed to him, but he took——

The Court: I do not want you to argue the case now. You will have a chance to do that later. What is the specific objection to the introduction of these exhibits? [73]

Mr. Klein: The objection, if it please the court, is they are entirely incompetent, irrelevant and immaterial, and have no connection in proving any of the issues, in this matter as to this defendant.

The Court: The objection is overruled and the exhibits will be admitted.

(U. S. Exhibits 1 and 2 for Identification were thereupon received in evidence.)

The Court: The Government rests?

Mr. Davis: Yes.

Mr. Klein: May it please the court, it is after four. We have been trying to get in touch with some witnesses. We did not anticipate going to trial today. I assume that it is time to take a adjournment.

The Court: No, I intended to proceed with this case and if necessary hold a night session tonight, because I have another case set tomorrow.

Mr. Klein: If it please your Honor, I will try to facilitate the speedy disposition of it, but there were certain witnesses that I could not get, and it was only at the last moment that we determined to go to trial, and under the circumstances I submit I should have some opportunity to get a sufficient number of witness to properly present my case to the court. Your Honor recalls the statement this morning that Mr. Grady had no idea, he being practically the last [74] one——

The Court: I think that is probably true. I had told all the defendants to be ready.

Mr. Klein: We had no idea we were going to trial. We want to dispose of it.

The Court: The Government has rested its case. Now you propose to put on witnesses?

Mr. Klein: Yes.

The Court: I will continue the case then until tomorrow morning at 9:30.

Mr. Klein: Thank you.

The Court: Ladies and gentlemen, we will take an adjournment until tomorrow morning at 9:30. I will ask you to please bear in mind that in the interval it is your duty not to discuss this case among yourselves or talk to anyone else about it, or to form or express any opinion concerning the case until the matter is finally put in your hands for decision.

The jurors may be excused until tomorrow morning at 9:30.

(Thereupon an adjournment was taken until tomorrow, April 23, at 9:30 o'clock a.m.) [75]

Wednesday, April 23, 1947, 9:30 o'Clock A.M.

The Court: Counsel, do you wish to make some motion in the absence of the jury?

Mr. Klein: Yes.

The Court: Will you take the jury out?

Ladies and gentlemen of the jury, you will be excused for a few moments because of the fact that counsel wishes to make a motion in the absence of the jury. I wish to caution the jury again that no member of the jury should converse with any other person or among themselves in connection with the trial of this case until the case is finally submitted to you.

(Thereupon the jury retired from the courtroom.)

Mr. Klein: May it please the Court, at this time, on behalf of my client, I desire to make a motion to have the court instruct the jury to bring in a verdict of not guilty on the ground that there has been a total failure of proof upon a reading of the Jones Miller Act and a reading of Count 23 of the Indictment upon which the defendant is now being charged. It clearly appears that this defendant is charged as follows: That on the 10th day of January, 1946, in the City and County of San Francisco, State of California, he fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and a preparation of morphine, to-wit, a lot of heroin in quantity particularly described as [76] one bindle, containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew. I respectfully submit to the court that all of the evidence in this case is clearly to the effect that, taking the testimony entirely as adduced from the Government witnesses as true, that all Mr. Pitta's connection with this affair was that he went into the storage liquor room and Bruno, some other person, had taken a bindle from its hiding place. Bruno took it out. They went into the liquor room, and he then took some of the contents upon a knife, sniffed it, and gave the contents or gave the bindle, rather, to Pitta, who likewise put some upon his knife and sniffed it, and that Pitta immediately

returned the bindle to Bruno or the other man who was with him there at that particular time; that he did not place it in the place of concealment, and had nothing to do with that, if it please your Honor, and while I am mindful of the fact that the second portion of the Jones-Miller Act provides that once it is proven that the defendant had possession of it, the possession of it must be explained by him—in other words, the burden shifts practically on that particular point—yet in view of the fact that the uncontroverted testimony is that he did not take it from its place of concealment, and did not put it there, and had no knowledge of the fact, there is no evidence in this case that he did have knowledge of [77] the fact of where it was.

The Court: I just want to interrupt you there. The evidence does show that he was present along with this man Bruno, and that the jury could properly conclude, could it not, that he saw Bruno take a package from where it was concealed, and then after using it, Bruno returned it to its hiding place. If the jury accepted that testimony, they could be justified in bringing in a verdict.

Mr. Klein: The mere fact that Bruno took it out of there is not evidence of the fact that Pitta knew it was there. That is the point.

The Court: The defendant is charged with concealing or facilitating the concealment.

Mr. Klein: But, may it please the Court, it does not appear that before he came into that place—there is no evidence that he knew there was any concealment of any kind.

The Court: That may be true, except the jury might conclude from the fact that the two of them came in together that he knew about it, and then there was a further concealment, according to the testimony, when the bindle was replaced in its place of concealment in the presence of the defendant. That concealment would certainly take place in the presence of the defendant.

Mr. Klein: Not necessarily. It does not clearly appear from the evidence in this case that it was concealed while [78] he was still there, because the evidence is to the contrary. The evidence is that he went out first, and that then Bruno came out, concealed it, and locked the door. There is no evidence that he stayed there or knew what disposition Bruno made of it, and if it please the Court, on the question of inferences there must be proof, and not inferences on that particular point.

The Court: That is true. All of the evidence given by the agents would certainly be sufficient to sustain a verdict that the defendant facilitated the concealment of hits bindle.

Mr. Klein: I examined every single, solitary case on this point. I examined every case under the Jones-Miller Act that was ever taken up on appeal in the entire country, and there is not one single solitary case that turns on that point. There has not been one appeal where that point was raised. The cases have all turned on possession, either by a ship's steward, somebody who brought it over in connection with the sale, or something of that kind.

The Court: I think possession at the very place

where the bundle was concealed is sufficient under the Jones Act to make out the Government's case. I never heard any different point than the point you are now making raised.

Mr. Klein: You see, your Honor, the statute makes it a crime, not for possession, but for concealment.

The Court: Yes, but the statute also says that possession [79] is sufficient evidence.

Mr. Klein: Possession by the defendant, but here, if it please the court, there is no possession. The possession is clearly the possession of Bruno. There can't be any inference from the testimony that has been adduced so far that Mr. Pitta had the possession of it.

The Court: He did. The agents testified he took possession of it and used it.

Mr. Klein: One moment, your Honor.

The Court: He had possession of it, because he used it according to the agents' testimony.

Mr. Klein: That is quite true.

The Court: I do not think we can draw any fine distinctions. If we started to say, going into the metaphysical question of whether a man had possession of it a minute, a half minute, or an hour, you would inject into the statute such refinements it would make the statute utterly incomprehensible. You could not enforce it.

Mr. Klein: No, the word "possession," if it please the court, has a well defined meaning in the law, and I do not think that the word "possession" as we understand it in the law, contemplates such a

possession as has been testified to in this case. Possession is the undoubted possession and ownership, the possession and ownership that goes with it. The fact that it is under your control, that is the possession, [80] I think, that is contemplated by the law.

The Court: I do not see how you could have more of a measure of control than taking the evidence at its face: The fact that the man had it in his hand and used it.

Mr. Klein: Yes, but where it is not yours——

The Court: You do not have to have title. Possession is different from title.

Mr. Klein: That may be true, but temporarily under your control, and in this particular instance it clearly appears that the possession and control of it, save for those few moments in the storage room, was absolutely in the hands of the other man. That is why I urge that upon the court.

The Court: Part of the time it was in the possession of the other man, of course. Is that the point of your motion, Mr. Klein?

Mr. Klein: That is the point of the motion.

The Court: I think, under the provisions of the statute, itself, in the face of the evidence, there is no basis for my directing a verdict in the case. I will deny the motion.

Mr. Klein: Exception.

Mr. Davis: If the Court please, in order that the record may be clear, I am not certain that I dismissed these other counts before trial, or whether I stated I would be willing to dismiss them. Before

the case goes any further I wish to move at this time to dismiss all counts in this indictment against [81] Joseph Pitta except the——

The Court: The 23rd count.

Mr. Davis: The one we are on trial on now.

Mr. Klein: The others that are pending?

Mr. Davis: I could dismiss Joseph Pitta in that indictment. In that indictment, Mr. Klein, we have been carrying it along because that happens to be the indictment on which all the defendants are on bail; and it merely follows the other indictment.

The Court: That is just the purpose of it, and as soon as judgment one way or the other is rendered in this case, either conviction or acquittal, then I will dismiss that charge as well. You may bring the jury in.

(The jury returned to the courtroom.)

The Court: The jurors are all present. You may proceed.

Mr. Klein: May it please the Court and you, ladies and gentlemen of the jury, at this time it is my privilege to explain to you the defense in this case. Mr. Pitta, a man now about 43 years of age, will tell you that he is taking care of his brothers' and his family's business interest in Oakland, and in what is known as the Island up near Stockton. He will tell you that he knew the owners of the Star Dust Bar; that his brothers conducted a bar in the City of Oakland, and that over the space of about two years, and on possibly three or four occasions, he went into that bar at Sutter and Larkin [82] for the purpose of effecting an exchange of liquor.

Scotch was hard to get. Other brands may have been hard to get. And bar owners had exchanged different brands that they may have brands that the other fellow had that they were not able to get, and for that purpose he was in the Star Dust Bar at Sutter and Larkin Street on perhaps, two, three, four occasions covering a period of two years. He was never in the bar late at night. We will then further demonstrate to you mathematically by computation that the peephole that has been referred to by the Government witness as 1 and 2 is located outside of a wall running practically across here (indicating on diagram). Today that place has changed somewhat by the construction of another wall, but at the time alleged in this indictment this wall ran straight across, and peepholes 1 and 2 were about 27 inches from this wall; that furthermore the door entering the liquor room swings from left to right, and that that door is about 35 to 36 inches wide, and is about six feet high. That is a substantially-built wooden door without any glass panels in it, so that no part of it is transparent; that when that door swings out and is opened, no one standing at peephole 1 and 2 can possibly see what is going on in that hall.

We will further prove to you that along this side, the northern side of the stock liquor room there are substantial wooden shelves; that the first three partitions are the places [83] where peepholes 3, 4, 5 and 6 were located. I think peephole 3 is in the second partition, peepholes 4 and 5 is in the third

partition, and peephole 6 is in the next one, with these shelves running about five or six feet high.

We will show that this liquor room is about 9x9—not quite that. We will show you that the distance from the foot of the shelving on the north side to the foot of the shelving on the other side—and there are shelves over here—covers about 102 inches.

We will show you that the rear portion of this room has a slanting ceiling so that nobody could stand there, and that is where the full cases are kept; and we will show you the condition of this room as of January, 1946, and there will be testimony to the effect that that room was in the same condition as it is today.

We will offer you testimony that when the liquor was brought into that room, it was taken out and placed upon the shelves, on this side and on this side, and that no boxes of any kind or no chairs of any kind were in there.

We will offer you testimony that the location of these peepholes are about 40 inches from the ground, and that no one sitting upon a chair, such as this witness chair in this case, or a similar chair, could possibly sit on that chair and look through any of those peepholes with any degree of comfort; that in order to look through those peepholes at all you would have to get way down in this kind of position (indicating). [84]

We will then show you mathematically—and this is capable of exact mathematical computation—that when you look through these peepholes in that position, the very most that you can hit, if a man was

standing clear at the extreme southern side of the liquor room and was paper thin in width—in other words, almost like the pictures you see in a motion picture, where they have not yet developed the three dimensions—that if a man is standing at the extreme southern side, paper thin in width, the very farthest he could possibly see would be up to about here, about 40 inches, and upon that showing and the testimony in this case I am going to ask you to return a verdict of not guilty.

NINO BRUNO

called as a witness on behalf of the defendant; sworn.

The Clerk: Q. Will you state your name to the court and jury?

A. Nino Bruno.

Direct Examination

By Mr. Klein:

Q. Mr. Bruno, where do you live?

A. 1030 Larkin.

Q. What is your business?

A. Well, I have been at the Star Dust for two years.

Q. What is the Star Dust?

A. It is a bar. [85]

Q. Where? A. 1030-1098 Sutter.

Q. Are you the owner of that bar?

A. No, my brother is, my brother Joe.

Q. You are working there? A. Yes, sir.

(Testimony of Nino Bruno.)

Q. What shift do you take there?

A. Well, I used to have the morning shift. Now, I have it all day and night.

Q. You say the morning shift. What hours does that cover?

A. That covers from 10 in the morning until 5 o'clock at night, but I used to hang around there most of the time.

Q. When you say you have it all now, just explain to the ladies and gentlemen of the jury what you mean.

A. I mean from 10 in the morning until 12 at night.

Q. I show you a diagram here. Can you see that? A. No, I can't see it very good.

Mr. Klein: May I ask the witness to step down to the blackboard, your Honor?

The Court: Very well.

Mr. Klein: Q. This is a diagram that has been offered in evidence here as Government's Exhibit 3 in evidence. It is alleged to represent the portion of the storeroom outside of the bar. Here is the entrance to the bar, coming out of the bar, here, coming into this hallway, and here is the [86] entrance to your liquor room.

A. Here is the entrance right here (indicating).

Q. This is the liquor room right there and there is the storage room behind the liquor room. Are you familiar with that now? A. Yes.

Q. You say you have been there two years?

A. Yes, sir.

(Testimony of Nino Bruno.)

Q. Have you the keys to this liquor room?

A. Yes, sir.

Q. Were you in that liquor room in the month of January, 1946?

A. Yes, sir.

Q. Have you been in that liquor room since that time?

A. Four or five times a day.

Q. Four or five times a day since then. Can you tell the ladies and gentlemen of the jury whether that liquor room today is in the same condition as it was in January, 1946?

A. Yes, sir, it is.

Q. Pardon?

A. It is. It has always been that way. The shelves are in the same place.

Mr. Davis: I couldn't hear the answer.

The Witness: I say the shelves are still in the same place and the bottles are still there, except what I used. When the new cases come in I put them on the shelves.

Q. You mean when liquor is delivered to you, what do you do [87] with that liquor?

A. I open it up and put it on the shelves. What I can't put on the shelves I stack in the corner.

Q. Was there liquor placed on the shelves on the north side of this since January, 1946?

A. The shelves have been in the same place all the time. There are shelves on both sides of the place.

Q. Has there been liquor in bottles on the shelves on both sides?

A. Always.

Q. Is that right?

A. Yes, sir.

(Testimony of Nino Bruno.)

Q. Were there ever any chairs in that place?

A. No, sir.

Q. Were there ever any wooden cases in that liquor store?

A. No, sir.

Q. What kind of cases are there, if any?

A. Cartons.

Q. Just explain to the ladies and gentlemen of the jury the size of those cartons, please.

A. They are about 6x10, I guess. They are regular liquor cartons.

Q. When you say 6x10, does that mean 6x10 feet?

A. I mean a foot wide and maybe—I don't know exactly—I think it is—I think they are about a foot wide and about [88] that long—a foot and a half or two foot long. I don't know what it is. I can't figure it out.

Q. What is done with the empty cartons?

A. We throw them out. We have to throw them out.

Q. Were there every any cartons actually in this place? Do you leave them in that place?

A. No, we do not. The janitor is supposed to burn them because they have numbers on them.

Q. When you say "supposed to burn them," has the janitor access to your liquor room?

A. No, not to the liquor room. Nobody has access to that, only my brother and I have keys to it.

Q. Who takes out the empty cartons?

A. I throw them out when I empty them.

(Testimony of Nino Bruno.)

Q. You throw them out. You may take the witness.

Cross-Examination

By Mr. Davis:

Q. Mr. Bruno, you say during the month of January, 1947, you were one of the owners of this Star Dust Bar?

A. I am not the owner. My brother Joe is the owner.

Q. You work there? A. Yes, sir.

Q. Did I understand you to say that at the present time the liquor room is in the same condition as it was on January 10 of 1946?

A. Well, the same—the shelves are in the same place. There [89] might be a couple of cases short or a couple of cases more in the corner of the place. The shelves are in the same place. Most of the bottles are in the same place. When I take some out I put some in.

Q. When you say the liquor room, do you mean this entire situation, here? Has there been any change in this hallway?

A. In the hallway? I mean the liquor room. I am not talking about the hallway. The hallway has a new partition on it.

Q. The hallway since January 10th has a new partition, is that correct? A. Yes.

Q. Will you come down and show us where the new partition is now?

A. This is the liquor room (indicating). There is a partition up there like that, crossways.

(Testimony of Robert Gibbs.)

Mr. Klein: Leaving out the bottles, if it please the Court, they are offered for the limited purpose of showing the shelving.

The Court: I would not allow them in evidence because that would be error and would be misleading. You can't take something out of a photograph and say you are offering something else in the photograph. You do not need a photograph to show the condition of the shelves. The witnesses have described it. If you had a picture of the empty shelves, that might be one thing. I think the evidence is completely without foundation. I will sustain the objection.

Mr. Klein: Exception.

The Court: That is all.

IRVING GUBIN

called as a witness on behalf of the defendant; and having been first duly sworn, testified as follows:

The Clerk: Q. Will you state your name to the Court and Jury?

A. Irving Gubin.

Direct Examination

By Mr. Klein:

Q. Mr. Gubin, where do you live?

A. I live at 2386 - 34th Avenue, San Francisco.

Q. Did you during your youth attend the University of California?

A. Yes, sir.

(Testimony of Irving Gubin.)

Q. Did you graduate from the University?

A. In 1926.

Q. Did you thereafter take any special course?

A. No, I graduated with a Bachelor of Science degree in Engineering.

Q. In Engineering? A. Yes, sir.

Q. Electrical Engineering? A. Yes, sir.

Q. Did you follow that vocation for a period of time?

A. I followed it for about twelve years. [104]

Q. Mention some of the firms you have been with?

A. I was with Bilsby Engineering and with Pacific Gas and Electric Company and some time with Six Companies of California.

Q. Were you likewise in the war effort during the last war?

A. I spent three and a half years in technical service, the Ordnance Department.

Q. And in connection with your work in these different industrial organizations and the Ordnance Department, did you have occasion to study sights and measure angles to determine vision?

A. I have done a lot of surveying.

Q. Did you have occasion to study sights and determine vision from angles?

A. Yes, in the Ordnance Department we used a lot of sights for various types of guns and howitzers.

Q. Were you taken to the premises at 988 Sutter Street yesterday? A. Last night.

(Testimony of Irving Gubin.)

Q. Were you there likewise this morning?

A. I was there this morning.

Q. Did you have access to the liquor room at that place?

A. Yes, I was taken in there.

Q. May I call your attention to this exhibit, if you will be good enough to step down here? [105]

Mr. Davis: If the Court please, I do not know whether an objection at this time is proper. I was going to wait for another question, but I presume we are getting to the point of it now. I am going to object to the testimony of this witness on the ground, first of all, I do not believe it is possible to qualify an expert as to a matter of sights, as to what you can see through a hole. That is something that is not covered——

The Court: I think you had better wait until you see what the nature of the questions is going to be.

Mr. Klein: Q. I call your attention to Government's Exhibit 3, which is intended to portray the rooms adjacent to that Star Dust Bar. Here is the entrance from the bar coming in and here is this wall coming this way, and here is the liquor room (indicating). Are you familiar with that?

A. Yes.

Q. Here is the room known as the liquor room, and here are some alleged peepholes, 1, 2, 3, 4, 5 and 6. Was your attention called to those last night and this morning?

A. They were.

(Testimony of Irving Gubin.)

Q. Did you make any measurements in that room of the shelving? A. Yes, I did.

Q. Did you measure the width and length of the room? A. I did.

Q. Did you measure the width of the door leading into the [106] liquor room? A. I did.

Q. How does that door open? Does it swing from left to right this way?

A. The door swings just as it is shown in the sketch.

Q. This way (indicating), is that right?

A. That is right.

Q. Did you observe the location of peepholes 1 and 2 outside of this wall? A. I did.

Q. You stated you made measurements of the shelving. Describe what kind of shelving was in that room.

A. The shelves extend as shown on the sketch here along the south and north side, and the ones alongside of the apertures or peepholes extend 25½ inches along the north wall.

Q. Wait a minute, now. When you say they extend 25½ inches along the north wall——

A. Out from the north wall.

Q. Can you draw on this board from your experience as an engineer the type of shelving that is in there?

A. This will represent the shelf along the north wall. The bottom shelf is 25 inches from the floor and extend out 25½ inches. There there is a shelf—these are center lines, because the boards are all

(Testimony of Nino Bruno.)

and keep everything stacked up. If it was fifteen minutes or if it was a half-hour, I can't tell you.

Q. You say there were no wooden cases in there. How do you know there were no wooden cases in there on January 10?

A. No liquor comes in in wooden boxes.

Q. No liquor at all?

A. I haven't got any wooden boxes.

Q. Did you have any on January 10?

A. Well, I don't remember receiving any liquor in a wooden box. I always got it in cartons.

Q. You do not know, however, whether there could not have been some wooden boxes?

A. I have been there two years and I have received no liquor in wooden boxes.

Q. You have not received any?

A. No, sir, not in wooden boxes.

Q. Was there any stock of liquor there when you took it over? A. Yes, there was.

Q. So you do not know whether or not on January 10 there could have been liquor there in wooden boxes, do you?

A. Well, we took inventory.

Q. Do you know now of your own recollection today whether or not there were any wooden cases in there on January 10?

Mr. Klein: I submit, if the Court please, the witness has answered the question to the best of his ability.

(Testimony of Nino Bruno.)

Mr. Davis: I do not believe he has. His last answer was he took inventory. [95]

The Court: Read the question.

(Question read.)

The Witness: A. No, I can't say there was—I don't remember exactly the date, but I don't remember seeing any wooden cases in there.

Mr. Davis: That is all.

Redirect Examination

By Mr. Klein:

Q. Mr. Bruno, is it your testimony that for over two years since you have been there you have received no liquor in wooden boxes in that place?

A. That is right.

Q. Is that your testimony? A. Yes, sir.

Q. May I again call your attention to this diagram? This is the liquor room. When you say you stack it up, what portion of the liquor room is it stacked up in? Near the door or——

A. In the back part here.

Q. In the back part? A. Yes.

Q. Explain the ceiling in the back part.

A. The ceiling is about from here up. It is a little too low for me. We try to keep it stacked up there. The fellow with the truck—the present driver is pretty big. He has to duck when he gets in. He leaves it there and figures when I get a chance to check it up, I will stack it on the side.

(Testimony of Nino Bruno.)

Q. What portion is this (indicating) ?

A. Those are steps.

Mr. Klein: That is all.

Recross-Examination

By Mr. Davis:

Q. Mr. Bruno, I will show you this Exhibit B For Identification, which purports to be a picture taken at some unknown time of the liquor store-room at the Star Dust Bar, and ask you to examine that and tell the Court and Jury whether or not it depicts a wooden box?

A. I don't know. I never seen that box there before.

Q. You never saw the box in there?

A. No.

Q. But you do see a wooden box in that picture?

A. Well, maybe my brother received it and opened it. I don't know.

Q. I didn't ask you whether it was open or closed, or who received it. I asked you if you see a wooden box in that picture.

A. It is a wooden box.

Q. I show you Defendant's Exhibit C For Identification, again purporting to be a picture of the liquor room of the Star Dust Bar taken at some unknown time, and ask you if you see a wooden box in that picture.

A. The same box.

Q. I did not ask you that. I asked you if you saw a wooden [97] box in the picture.

(Testimony of Nino Bruno.)

A. Well, my brother received this stuff——

Q. I didn't ask you that.

The Court: Q. Is there a wooden box there?

The Witness: A. There is a wooden box.

Mr. Davis: Q. I show you Defendant's Exhibit D For Identification, again purporting to be a picture taken at some unknown time of the liquor storeroom at the Star Dust Bar, and ask you to examine it carefully and to count how many wooden boxes you see in there?

A. This is not inside the liquor room. This is outside the liquor room.

Q. That is outside the liquor room.

A. Yes, sir.

Q. That is outside the liquor room?

A. Yes, sir.

Q. Did you ever see any wooden boxes outside the liquor room?

A. They are all wooden boxes, all beer boxes.

Q. All beer boxes?

A. Well, some of them are cartons. All beer boxes, most of them—Lucky Lager is all wooden.

Q. And the other are paper cartons, is that correct? A. Cartons.

Q. These pictures offered by defense counsel truly represent a picture of the liquor store room, and after having examined [98] them you realized you were mistaken in saying you never saw a wooden box——

A. Well, there is two because——

The Court: Just a moment.

(Testimony of Nino Bruno.)

Mr. Klein: Just a moment, if it please your Honor, I submit that is argumentative.

The Court: It is argumentative. The testimony speaks for itself.

Mr. Davis: I will widthdraw it. That is all.

The Court: Anything else of this witness?

Further Redirect Examination

By Mr. Klein:

Q. Showing you what has been offered here as Defendant's Exhibit B for identification, will you be good enough to point out to me the wooden box there?

A. This one right here (indicating).

Q. What kind of wooden box is that?

Mr. Davis: I am going to object to that question, your Honor. I do not believe it is proper redirect examination.

The Court: I think we are wasting an awful lot of time on minor matters.

Mr. Klein: I want to show where it is. I want to show what it is and the size of it.

Mr. Davis: I do not see where it is material to this case at all.

Mr. Klein: It is material from this standpoint, if it [99] please your Honor: it is the contention they sat on a wooden box.

The Court: This examination has nothing to do with what the Government's lawyer asked the witness about. He said he did not see any wooden boxes in there, and he points out now there are

(Testimony of Nino Bruno.)

some in this photograph. Now, what they were used for was not gone into. That was the only subject of the inquiry.

Mr. Klein: Tell us where that wooden box is.

A. On a shelf.

Mr. Davis: I object to this, your Honor. No matter where it is, those pictures do not represent what happened on January 10. My only purpose in offering them was to cross-examine the defendant on his testimony that he never saw a wooden box in there in the whole two years that he was there, and by defendant's own pictures I show that there was a wooden box in there. Now, where it was or what it was for or what kind of box is absolutely immaterial.

The Court: I think you have spent enough time on this matter.

Mr. Klein: I will refrain from further examination on that until I have had the opportunity to offer these pictures in evidence for the perusal of the Jury. Thank you, Mr. Bruno.

ROBERT GIBBS

called as a witness on behalf of the defendant; and having been first duly sworn, testified as follows:

The Clerk: Q. State your name to the Court and Jury.

A. Robert Gibbs.

(Testimony of Robert Gibbs.)

Direct Examination

By Mr. Klein:

Q. Mr. Gibbs, where do you live?

A. 2801 Nicol Avenue in Oakland.

Q. What is your business?

A. I am a photographer by trade, sir.

Q. Are you in business for yourself or employed??

A. I am employed, sir.

Q. By whom?

A. Mr. Nathenson.

Q. What was your business in the year 1946?

A. Photographer.

Q. Were you employed by Mr. Nathenson at that time?

A. Yes, sir.

Q. Are you familiar with the premises known as the Star Dust Bar at 988 Sutter Street?

A. Yes, I was called there last year to take some pictures.

Q. In the year 1946 were you directed to take some pictures at that place?

A. Yes, sir.

Q. Did you personally take those pictures? [101]

A. Yes, sir.

Q. You stated you have been a photographer for how many years?

A. About fifteen years.

Q. I will show you——

Mr. Davis: I am going to object, your Honor. The proper foundation has not yet been laid. We do not know the date of these pictures yet.

Mr. Klein: I am going to come to it.

Q. I will show you some pictures and ask you whether you took some pictures at that place, and

(Testimony of Robert Gibbs.)

that these represent the pictures that you took (handing pictures to witness).

A. Yes, I took all of them.

Q. When did you take those pictures?

A. Approximately in May.

Q. Of what year? A. 1946.

Mr. Klein: Now, may it please the Court, I submit that I have laid the foundation for asking him to identify these pictures and offering them.

Mr. Davis: Your Honor, obviously the pictures are improper. They were taken in May, 1946, and we are talking about something that happened on one particular day, January 10, 1946.

The Court: What is the materiality of this?

Mr. Klein: I want to show by photograph the condition of [102] that storeroom with reference to shelves and bottles, and it has been testified to by Mr. Bruno that the condition of those shelves and bottles on those shelves is the same for the last sixteen months.

Mr. Davis: I can't see how there has been sufficient foundation to introduce in evidence and make a part of the record in evidence photographs taken months after this affair.

Mr. Klein: These pictures are offered for the limited purpose of showing the condition of that room, the shelving and the bottles on the shelves.

The Court: Yes, but that does not show the condition of the bottles or the contents on the day that that is charged in this indictment.

(Testimony of Nino Bruno.)

Q. You mean the partition is in this room or in the liquor room?

A. Wait a minute. This is the liquor room right here (indicating). Let me figure this out. Are these the holes they were peeking from? Yes, here is the partition right here. This all partition now (indicating).

Q. In this section here, which is the hallway in front of the liquor room, there is now a partition running diagonally across it, is that correct?

A. Yes.

Q. In the same general direction as this dotted line, is that correct? A. Yes. [90]

Q. When you say that the liquor storeroom is in the same condition, I take it you mean as far the physical condition, the shelves, and walls, and so forth, right? A. Yes.

Q. In other words, you do not have any independent recollection now of how many bottles or how many cases were in there on January 10th?

A. No, but the shelves have always been full. We always—the liquor that was in that corner is all rum and brandy. That stuff doesn't move. That stays there practically all the time.

Q. Which corner do you mean?

A. Where the peekholes were.

Q. That does not appear to me to be in the corner, Mr. Bruno.

A. Well, where them numbers are.

Q. You mean all that wall was just devoted to rum and brandy?

(Testimony of Nino Bruno.)

A. Rum and brandy, and it is still there.

Q. So your only basis for your statement that the condition of the room on January 10th was the same as it is today is——

A. There might be one or two bottles different. That is all. That stuff don't move. [91]

Q. Over a period now of two years you would say that that has not altered; you did not have more room at one time or less?

A. There would be a few bottles.

Mr. Klein: Pardon me. I submit it is not over a period of two years since January, 1946.

The Court: A period of about sixteen months, isn't it?

Mr. Davis: Sixteen months.

Q. You say over that period of sixteen months there might be only a difference of two or three bottles?

A. If there is a difference of a case, I usually put it in.

The Court: Q. The question was, he wants to know over a period of sixteen months whether there was a difference of two or three bottles.

The Witness: A. No, there is more than two or three bottles. It was six or seven different kinds of rum and several different kinds of brandy. I don't know exactly how many bottles missing, but there is about two cases to each shelf.

Mr. Davis: Q. In any event, you have no independent recollection of the number of bottles or

(Testimony of Nino Bruno.)

where they were or anything else on January 10, have you? A. No.

Q. You say there were never any cases in that room, liquor cases?

A. Not wooden cases, no. Cartons, I said. [92]

Q. Of course, you have no independent recollection of whether or not there were any cartons in there on January 10, 1946, have you?

A. Why, sure, there is cartons. There always has been cartons in there. But they are all full and stacked in the corner.

Q. You mean there are no empty cartons in there?

A. When we empty the carton we throw it out.

Q. In that liquor room at all times there have been full cartons, is that correct?

A. Yes, stacked in the corner. When the liquor comes in we stack it up.

Q. Your reason for saying that if any cartons were there on January 10 they were stacked in the corner is because it is your custom to stack it in the corner, is that correct?

A. Well, inside the liquor room, yes.

Q. I mean, you have no independent recollection whether there were case in the middle of the floor, in the corner, or any place else on the 10th day of January, 1946, have you?

A. We don't keep them cases in the middle of the floor.

Q. That is what I am asking you: your only

(Testimony of Nino Bruno.)

reason for that statement is it is your custom or habit to put them some place?

A. Just as quick as the fellow brings them in the room, I stack it. If I haven't time, I go back fifteen or twenty minutes after and stack it. [93]

Q. But you do not know the condition of the cases in that storeroom on January 10?

A. Well, no.

Q. Other than it is your habit or custom to stack them? A. That is right.

Q. Do you mean to say it is possible for you, when a stock of liquor is brought into the store-room, that within fifteen minutes every time it is brought in you can get in there and stack that away?

Mr. Klein: If the Court please, I object to that question as argumentative. The witness has testified. Counsel asks, "Do you mean to say?" He said it.

Mr. Davis: I do not believe it is argumentative, your Honor. Perhaps the first clause, "Do you mean to say,"—I *with* withdraw it and rephrase it.

Q. It is your testimony, then, that in this bar over the period of time that you have been in there, at any time that liquor is delivered, it is possible for you or someone else within fifteen minutes to get into the liquor storeroom and stack it all away, is that correct?

A. Every time—I try to keep the room clean. It doesn't have to be fifteen minutes. It might be five minutes. I always try to keep that room clean

(Testimony of Irving Gubin.)

three-quarter inches—then there is a shelf $14\frac{1}{2}$ inches, and below that shelf, right alongside [107] the north wall, on these several apertures that extend two inches below that shelf. These shelves are all $25\frac{1}{2}$ inches. There is a board shelf that is 15 inches above this shelf. These apertures are all along the north wall, and they are all not greater than two inches below the middle shelf.

Q. Let us clearly understand this: When you say this shelf, referring to the second section from the floor——

A. That is right.

Q. This shelf is $25\frac{1}{2}$ inches wide, is that right, so that the end of the shelf would be at this end?

A. That is right.

Q. And this wall is the one to which the storeroom is adjacent?

A. That is right.

Q. This peephole that you refer to you say comes right to the top of the shelf?

A. No, the peephole is about four inches square, but it only extends two inches below the bottom of the shelf.

Q. Below the bottom of the shelf?

A. Below the bottom of the shelf.

Q. How many peepholes did you observe there through this storeroom?

A. In the storeroom there are four peepholes.

Q. Will you please be good enough to give us, if you can, the location of those peepholes?

A. The first peephole is 24 inches from the northeast corner. [108] It is marked here as No. 3.

Q. In other words, peepholes 1 and 2 are in

(Testimony of Irving Gubin.)

the liquor room, inside the liquor rooms; peephole 3 is how far from this wall? A. 24 inches.

Q. And how far from the ground?

A. The distance from the ground is the sum of these totals here, which 40 inches exactly. The bottom of the peephole is 40 inches off the ground.

Q. And peephole No. 3 is where?

A. That is 51 inches.

Q. From where?

A. From the same—the northeast corner.

Q. Peephole 5 is where?

A. 66 inches.

Q. And peephole No. 6?

A. That is the last one I saw. That is 88 inches.

Q. From this corner?

A. From that same corner.

Q. And what is the situation with respect to their heights from the floor?

A. They are all 40 inches from the floor.

Q. What is the situation with respect to whether or not the peephole is directly below the shelf or not?

A. They are all not below two inches of the bottom of the middle shelf. [109]

Q. Did you take a measurement of the size of the room?

A. Yes, I took a measurement of the size of the room.

Q. What is the distance from the shelving, the outside portion of the shelving from the north side of the liquor room to the northerly side of the shelving on the south side of the liquor room?

(Testimony of Irving Gubin.)

A. It was exactly 102 inches. That would be from here to the shelves that started here. It is 102 inches.

Q. Did you go in the storeroom and look through the peephole?

A. I went in the storeroom and looked through the peephole.

Q. Can you figure out mathematically that if a person looked through peepholes 3, 4, 5 and 6, what would be the vision, the utmost vision on the south side of the wall from the floor?

Mr. Davis: Just a moment. This is where I am going to interpose my objection, on the first ground, that I do not believe it is possible to qualify any expert to testify as to what a person can see through a certain hole, and on the further ground that this man, the same as with the photographs, is testifying to a condition which existed up there last night and not a condition which existed on January 10. His testimony is really incompetent, irrelevant and immaterial.

Mr. Klein: May it please your Honor, we are offering the best testimony that we can under the circumstances. The peepholes are there, and if Mr. Davis makes any contention [110] that the peepholes are in any different position today than they were in January, he can take the Government agents to that location and have them view the peepholes to determine whether or not they are. We are offering the best testimony that it is possible for us to get. We have offered witnesses to show that

(Testimony of Irving Gubin.)

the condition of the room was the same as in January, 1946.

The Court: I think, Counsel, it would be error for the Court to allow testimony as to what some man looking through some hole up there on the wall yesterday saw.

Mr. Klein: That is not what I am asking him. I am asking him if it is possible from a mathematical calculation, having in mind the location of the peephole, and having in mind——

The Court: I do not see any question in mathematics involved here. It is just a question of what a man can see if he puts his eye in a place. That is all.

Mr. Klein; Not at all. This is a mathematical problem.

Mr. Davis: In the first place, the vision would not be the same. There are bottles that were changed since January 10.

Mr. Klein: We are not concerned with bottles. Leaving the bottles out, leaving everything out of there, it is a mathematical problem. Given a hole a certain distance from the floor and from the protruding shelf, you can figure out [111] mathematically what the utmost possible vision would be. That is a mathematical problem.

The Court: You mean how far you can see?

Mr. Klein: Not how far; how far you can see from the ground, Judge.

The Court: Didn't the witness testify that this peephole extended above the shelf, too?

The Witness: Yes, sir.

(Testimony of Irving Gubin.)

The Court: What is the good of the testimony then?

The Witness: The shelf blocks it out in the back, your Honor.

The Court: You just said a moment ago, if I understood you correctly, the peephole extended above and below the shelf. Only two inches were below the shelf.

The Witness: Two inches were below, but the shelf has a certain width and that covers it up. You can't see above that peephole.

The Court: That is what I am asking.

Mr. Davis: Furthermore, I submit you can't work it out mathematically. You might be able to work it out mathematically on a range finder or something like that, but I submit it is common knowledge, and the Court can take judicial notice, that the vision you have through any aperture depends largely on the height of the individual, the position in which he is looking, whether he moves his head a fraction or his eye; [112] you can look through at different angles. If you look directly through an aperture at one fixed point I will admit you could figure out at the other end what the field of vision would be, just as if you look through a pair of binoculars a distance of 100 feet, and the binoculars are a certain power, you will have a vision at so many feet; but the moment you move the binoculars a fraction of an inch, you change that vision, and we can't go back now and establish in what manner the agents moved their

(Testimony of Irving Gubin.)

heads or craned their necks, and I think it is impossible and would be in error, misleading the Jury, in what an agent who said he saw something to allow testimony that he could not have seen.

Mr. Klein: We do not want error. I do not care what position the agent had his head in. I do not care how he sat. I do not care how he looked. I am offering this mathematical problem that given this shelf at this height from the floor, with an aperture two inches below this shelf, the shelf extending $25\frac{1}{2}$ inches, in a room 102 inches wide, what is the utmost possible line of vision across that room? I do not care how he looked, where he looked or what he looked at.

The Court: You do not mean his vision across the room? I suppose what you are trying to develop is that if you are looking under the shelf you can't see what is above it.

Mr. Klein: No, this is what I am trying to develop: no matter how you look, looking through this peephole in any [113] manner that you want, the utmost possible line of vision along the other side strikes at a certain distance, and not above that. That is what I am trying to develop, your Honor. It is a mathematical problem and not a question of all this.

The Court: All you are trying to show is if you look through a peephole under this board, looking out you can only look a certain distance upward at a very slight angle. I suppose that is what the witness is going to testify to?

(Testimony of Irving Gubin.)

Mr. Klein: The utmost vision.

The Court: What is the materiality of that?

Mr. Klein: On the question of the ability of the agents to see the man in the room, to see the face of the man in the room.

The Court: You are offering this testimony to show the agents did not see the man in the room?

Mr. Klein: That is right.

The Court: And they are not telling the truth?

Mr. Klein: That is right.

The Court: I will allow the witness to testify as to the range of vision.

The Witness: Taking the problem of two inches below, which is the farthest down you can see, and passing a plane along this shelf, it so happens it comes exactly to two congruous triangles—I have exaggerated in here—well, I will drop it below.

The Court: Let us shorten this.

Q. What is the highest point above the shelf?

The Witness: A. These two things are in proportion. 250 to 102, as 2 is to 8; so you would add 8 inches onto the 40 inches——

The Court: Q. You could see 48 inches above the ground at the farthest point?

A. Yes, at the very edge of the shelf.

Mr. Klein: Q. Did you observe the condition existing in the storeroom on the other side of the peepholes?

A. I don't understand that question.

(Testimony of Irving Gubin.)

Q. Did you observe the condition existing in the storeroom on the other side of this wall?

A. Yes.

Q. Did you observe the peepholes there?

A. Yes, I did.

Q. Would you say that a man sitting in a chair like you are sitting in now could look through those peepholes?

Mr. Davis: I object to that, your Honor. That is clearly not expert testimony. That is merely the height of a hole.

The Court: I will sustain the objection to that question. That calls for an opinion and conclusion of the witness.

Mr. Klein: That is all. Take the witness. [115]

Cross-Examination

By Mr. Davis:

Q. You say you measured these holes last night?

A. What was that, sir?

Q. Did you say you measured these holes last night?

A. I only measured the distance below the shelf.

Q. You did not measure the size of the hole?

A. No, it is very difficult to measure the hole because there is a screen in front of it. I have it here somewheres. The holes are approximately three inches square. You know they are just chopped in. But the bottom seems to lie across.

Q. . Are they all the same size?

A. They are all practically the same size.

(Testimony of Irving Gubin.)

Q. Isn't it a fact that the first hole in the store-room is 2 inches by 8 inches, approximately?

A. Is 2 inches by 8 inches?

Q. Yes.

A. What would that be? No. 3 hole?

Q. That would be No. 3 hole, yes?

A. I don't know whether it was 2 by 8 inches.

Q. Isn't it a fact that No. 3 is three and a quarter by eight inches approximately?

A. You mean eight inches high?

Q. Yes. A. I didn't see it that way. [116]

Q. And No. 4—No. 5 is three and a quarter by eight inches, approximately?

A. I didn't see it that way.

Q. And isn't No. 6 three and a quarter by three and a half inches, approximately?

A. That is about it. They all look about three by three to me.

Q. So it is your opinion all those peepholes were the same size approximately? A. Yes, sir.

Q. 1 and 2,—you did not look through those?

A. No, there is nothing there.

Q. You mean there is nothing there now that you could see?

A. You could see where the wall had been covered.

Mr. Davis: That is all.

Redirect Examination

By Mr. Klein:

Q. Just one other question that I overlooked.

(Testimony of Irving Gubin.)

Calling your attention, Mr. Gubin, to peepholes 1 and 2 that are outside the liquor room—do you understand? A. Yes, sir.

Q. How far from this wall was peephole No. 1?

A. Peephole No. 1 was 28 inches in a down direction and it was 41 inches high.

Q. Peephole No. 2?

A. I couldn't find that one at all. [117]

Q. Did you measure the door of the liquor storage room?

A. The door extends—well, it starts 57½ inches from the right corner towards the left, and it opens—it is 35½ inches wide and it opens in, as shown on this sketch—opens out.

Q. It opens out? How long is that door?

A. It is 35½ inches wide.

Q. How high?

A. The door just comes within a couple of inches of the top and bottom. The room is 71 inches high. So it just barely clears it.

Q. Is that a wooden door?

A. It looked to me like—I think it was about three inches thick.

Q. Are there any glass panels in that door?

A. No, the door is solid wood.

Mr. Klein: Thank you.

Mr. Davis: That is all.

JOSEPH PITTA

the defendant herein; called as a witness on his own behalf; and being first duly sworn, testified as follows:

The Clerk: State your name to the Court and jury.

A. Joe Pitta. [118]

Direct Examination

By Mr. Klein:

Q. Mr. Pitta, where do you live?

A. 4258 Balfour Avenue, Oakland.

Q. What is your business?

A. I have been taking care of my dad's business and I have been in the bar business and restaurant business.

Q. Where?

A. In Oakland, Lake Tahoe—mostly in Oakland.

Q. When you say your dad's business, what do you refer to? Ranching properties?

A. Yes.

Q. Mr. Pitta, have you ever been convicted of a felony? A. Once.

Q. When was that? In Los Angeles?

A. In San Diego.

Q. When was that?

A. In 1940, I believe.

Q. Do you know the Star Dust Bar?

A. Yes.

Q. Were you in the Star Dust Bar on January 10, 1946, at ten-thirty at night?

A. Well, no, I don't think I was in there that

(Testimony of Joseph Pitta.)

late at night. I don't know whether I was there January 10.

Q. I am asking you whether you were there at ten-thirty at night on January 10? [119]

A. No, I don't—no.

Q. How can you say you were not there on January 10 at ten-thirty?

A. I always—when I went there, I went there to exchange liquor, to trade liquor off with the Bruno brothers, and it was always early in the evening, sometimes in the afternoon.

Q. Will you be good enough, Mr. Pitta, to speak up so that each one of the ladies and gentlemen of the Jury may hear you? I am going to ask you this: Were you ever in the Star Dust Bar at ten-thirty at night?

A. No, not at ten—no.

Q. How many times have you been in the Star Dust Bar altogether, about?

A. Oh, I would say, two or three or four times.

Q. And covering what period of time?

A. A couple of years.

Q. Covering a couple of years.

You may take the witness.

Cross-Examination

By Mr. Davis:

Q. I am merely going to ask you one question, Mr. Pitta: Isn't it a fact that on the night of January 10, 1946, that you went into the Star Dust Bar and went with Vince Bruno down into the liquor

(Testimony of Joseph Pitta.)

room, and that there you and Vince Bruno used a bindle of heroin? A. No, sir. [120]

Q. You never had possession of that bindle of heroin at that time?

A. No, sir, I never seen one.

Mr. Davis: That is all.

Mr. Klein: Thank you.

The defendant rests, if it please the Court.

The Court: The Government rests?

Mr. Davis: Yes, your Honor.

(Thereupon Mr. Davis and Mr. Klein made their arguments respectively to the Jury, after which the Court instructed the Jury as follows:)

The Court: The record will show that the jurors are all present.

Ladies and gentlemen of the Jury, you have heard the evidence in this case and listened to the statements of the attorneys. It is now the duty of the Court to briefly outline to you the rules of law that are applicable to this case and which you should follow in performing your duties. The Jury and the Judge in a Federal Court are are, in a way of speaking, a team. We each have a part to play in the administration of justice. While our functions are somewhat different, when put together they are essential as a whole in the judicial process. The Jury decides the question of fact. That [121] is exclusively the power and the province of the Jury. With that function the Court does not and should

not interfere. You are not to assume from anything that the Court may have said during the course of the trial of the case, in ruling upon matters of evidence or objection of counsel or perhaps in propounding questions to the witnesses, that the Court was intending to express any opinion as to the guilt or innocence of the defendant. Whatever rulings the Court may have made, whatever statements the Court may have made in that connection were not intended in any manner to indicate an opinion by the Court as to what your verdict should be, but such statements on the part of the Court were only in pursuance of the Court's power and, indeed, its duty to supervise the trial of the case and to expedite it.

The Judge has the exclusive function of telling the Jury what the law is, and the Jury must accept the Judge's statement of the law. Sometimes jurors do not like a law. They think it should be different. But that may not enter into your consideration of this case. You must take the law as the Judge gives it to you, and in like manner the Judge must and should accept your judgment as to the question of fact, and should not interfere with your power to decide the facts in the case.

In your deliberations it is your duty to exclude entirely any question of sympathy or any prejudice. You are also not [122] concerned with the matter of punishment in the event a verdict of guilty should be found in this case. The matter of punishment is solely a matter for the Court in the event of a verdict of guilty.

There are some few rules that are applicable to

criminal trials in the Federal Courts that may assist you in weighing the evidence in this case. In the first place, you must, as I told you when you were impaneled, not to have in your minds any presumption or feeling that, because the defendant was indicted, he is guilty. As I explained to you, the presumption in our law is a presumption of innocence, and that obtains and continues until such time as you are convinced by the evidence beyond a reasonable doubt of the guilt of the defendant. There is a burden upon the part of the Government to prove the guilt of the defendant beyond a reasonable doubt.

Now, we speak of reasonable doubt. Attorneys in their arguments have commented upon that. I will give you the definition that I usually give to jurors as to what is meant by a reasonable doubt. It really is what the term implies: it is a doubt that is founded upon reason. It does not mean every conceivable kind of doubt that one may have. It does not mean a doubt, for example, that is imaginary, fanciful, captious or speculative in character. It means an honest doubt that appeals to reason and is founded upon reason. If after considering all the evidence in this case you have such a [123] doubt in your mind as would cause you or any other prudent man or woman to pause or hesitate before acting in some grave transaction of your own life, then you would have such a doubt as the law contemplates to be a reasonable doubt. This rule of reasonable doubt applies to every element of the offense that is charged.

You decide whether you believe the witnesses. That is your part. You decide what weight should

be attached to the testimony of the respective witnesses. We start out with the presumption that a witness speaks the truth. That is, when a man takes this chair and starts to testify, there is the presumption that he is going to tell the truth. However, that presumption with which we start out may be negatived by several things. It may be negatived by the manner in which the witness testifies, by the character of his testimony, by contradictory evidence, by his motives, by evidence as to his character and reputation for truth, honesty and integrity, or by his criminal record, if any, that is, whether or not he has been convicted of a felony. In passing upon the credibility of the various witnesses, it is your right to accept the whole or any part of the testimony of a witness, or to discard or reject the whole or any part of the testimony of a witness. If it appears to you that a witness has testified falsely in any material respect, you are entitled to distrust his testimony in other particulars. In that event you [124] are free to reject all of the witness' testimony.

You may consider the following factors in determining how much weight you want to give to the testimony of the witness: you may consider the circumstances under which the witness testifies, his demeanor and manner on the stand, his intelligence, the connection or relationship which he bears to the Government or to the defendant, the manner in which he might be affected by your verdict, the extent to which he is contradicted or corroborated by other evidence, if at all, and any other matter that is disclosed by the evidence which reasonably

sheds any light upon the credibility of the witness.

It is your duty to disregard any testimony out or any testimony to which an objection has been sustained. You may not consider any exhibits which, though offered, have not been received in evidence.

The attorneys have argued this case, as is their right, and indeed their duty. If you find that there is any discrepancy or variance between the facts testified to by the witness and the facts as stated to you by the attorneys in their arguments, you will discard the statement of facts given by the attorneys and consider only the statement of facts as you recall it, given by the witnesses or produced in the evidence in the case. Now, you may find some discrepancies or inconsistencies in the testimony of the witness, or perhaps between the testimony of different witnesses. If such discrepancies [125] or inconsistencies are not material and do not affect the true issues of the case, and if they do not reasonably bear upon the guilt or innocence of the defendant, you should not waste your time in considering it.

It, of course, is your duty, despite these various rules that the Court gives you, to use your good sense, just as you would in acting upon vital and important matters pertaining to your own affairs when you come to a decision in this case. You should resolve the facts of the case according to calm and deliberate judgment and in the light of your own knowledge of the natural tendencies and propensities of human beings.

You must carry in your mind that the defendant is entitled to any reasonable doubt that you may

have in your minds. At the same time you should remember if you have no such doubt the Government is entitled to a verdict. In this case the defendant has testified in his own behalf. That being so, you will determine his credibility according to the same standards applied to any other witnesses. I have already pointed out some of them to you. You may also consider in this connection the interest the defendant may have in the case, his hopes and his fears, what he has to gain or lose as a result of your verdict, and you may, in weighing his testimony, take into account, as testified to, that he has been heretofore convicted of a felony. [126]

The case before you, ladies and gentleman, is a simple issue of fact. I do not mean to imply by that statement that it is not important because it may be simple. The case, of course, is important. It is important to the Government of the United States and of course it is most important to the defendant in the case. You have already been told that the charge against the defendant, Joseph Pitta, is that on the 10th day of January, 1946, in San Francisco, he fraudulently and knowingly concealed and facilitated the concealment of a certain quantity and derivative and preparation of morphine, to-wit, a lot of heroin in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as the said defendant then and there knew.

That charge arises out of, and is framed in part, in the language of a Federal statute known as the Jones-Miller Act. In substance that law provides

that if a person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction contrary to law, or assists in so doing, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of any such narcotic drug, after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon [127] conviction be punished as provided in the statute.

Heroin, which is the particular drug described in the indictment, is a narcotic drug as referred to in the Jones-Miller Act, the substance of which I have just given you.

This same law further provides that where there is a charge of violation of the Jones-Miller Act filed, a trial had on that charge, and the defendant is shown to have, or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the **Jury**. Therefore, if you are satisfied beyond a reasonable doubt by the evidence in this case that the defendant had possession of this narcotic drug, and he has not explained that possession to your satisfaction, you may find him guilty of violation of this statute.

Possession is sufficient, provided you are convinced beyond a reasonable doubt that the defendant was in possession, to satisfy the requirements of proof under the Jones-Miller Act, which I have read to you. Likewise if you are satisfied beyond

a reasonable doubt that the defendant was in possession of the narcotics referred to and described in the indictment, you are at liberty to infer that the narcotics had been to the knowledge of the defendant imported and brought into the United States contrary to law. In other words, if there is proof beyond a reasonable doubt of possession by the defendant, [128] and no satisfactory explanation by the defendant, that is, satisfactory to the Jury, the Jury is under such circumstances justified in finding a verdict of guilty. That means that the only question before the Jury in this case is this: the only question before the Jury is a question which arises out of this conflict: the narcotic agents of the United States have testified that they saw the defendant in the possession of the narcotic here in question. The defendant has denied that. If you are satisfied beyond a reasonable doubt that the narcotic agents have told the truth, you may bring in a verdict of guilty. If, on the contrary, you are not satisfied beyond a reasonable doubt that they have told the truth, you may then bring in a verdict of not guilty.

If you can conscientiously do so, ladies and gentlemen, you are expected to agree upon a verdict. You should freely consult with one another in the jury room. The defendant is entitled to the independent judgment of each of you on the question of his guilt or innocence. However, as I have said, you should freely discuss the matter in the jury room between one another. If any one of you should be convinced that your view of the case is erroneous,

you should not be stubborn and you should not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper—in fact, your duty and your province—to adhere to your own view if after a full exchange of ideas you still believe you [129] are right.

If it should become necessary for the Jury to communicate with the Court during its deliberations or upon its return to court with respect to any matter connected with the trial of this case, you should not indicate to the Court in any manner how the Jury stands numerically or otherwise on the question of the guilt or innocence of the defendant. This caution the Jury should observe at all times after the case is submitted to it until the Jury has reached a verdict. When all of you agree to a verdict, it is the verdict of the Jury. In other words, your verdict must be unanimous. After you have deliberated, and if you have reached a verdict, the verdict should not be returned to the courtroom unless all of you have agreed to it.

When you retire to deliberate, you may select one of your number as foreman or forelady, as the case may be, and he or she will represent you in your further conduct of this case in this courtroom and will represent you as spokesman or spokeswoman with respect to any matters that require your further communicating with the Court.

We have prepared a form of verdict for you. It reads as follows:

“We the Jury find as to the defendant at

the bar as follows: as to Count 23 of the indictment.”

In the blank space you will write the word “Guilty,” [130] or “Not Guilty,” in accordance with your decision. This form of verdict is prepared for your convenience and is not intended to indicate in any way what your verdict should be.

Does either side wish to note any exceptions to the charge?

Mr. Davis: No exceptions.

Mr. Klein: None at all, your Honor.

The Court: Ladies and gentlemen, you may now retire to consider your verdict.

(Thereupon, the Jury at 1:50 p.m. retired from the courtroom to consider their verdict.

(Upon their return to the courtroom the Jury announced their verdict as “Guilty.” The jurors were polled and each answered that the verdict was his or her verdict.) [131]

[Endorsed]: No. 11619. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Pitta, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed June 3, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11619

JOSEPH PITTA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORDS
NECESSARY FOR THE CONSIDERATION
THEREOF

Now comes the appellant in the above-entitled appeal and presents his statement of points on appeal and designates the portion of the records that he considers necessary for the consideration thereof, to-wit:

STATEMENT OF POINTS ON APPEAL

I.

That the Court erred in permitting the Assistant United States Attorney, over the objection of the appellant, to state to the jury that another defendant allegedly involved in the transaction for which defendant was convicted had been convicted in another portion of the case.

II.

That the Court erred in admitting in evidence Government's Exhibits 1 and 2, during the testi-

mony of Elmer A. Briscoe, the admission of which were objected to upon the ground that they were incompetent, irrelevant and immaterial.

III.

That the Court erred in denying the defendant's motion for a verdict of not guilty and/or a judgment of acquittal at the conclusion of the Government's case, which motion was made substantially

(a) upon the ground that there was a variance between the charge and the proof;

(b) that there was a total lack of evidence to sustain the charge that the defendant did "fraudulently and knowingly conceal and/or facilitate the concealment of a certain quantity of a derivative or preparation of morphine, to-wit, one lot of heroin in No. 1 particularly described as one bindle of heroin which had been imported into the United States contrary to law;"

(c) that the Court erred in denying defendant's motion for a verdict of not guilty and/or a judgment of acquittal upon the ground that the evidence was insufficient as a matter of law to sustain a verdict of guilty.

IV.

That the defendant was prejudiced during the trial of said cause by being compelled to go to trial on an indictment charging in fifty-six counts numerous and many defendants involved in narcotic transactions unrelated and unconnected with the appellant.

V.

That the Court erred to the substantial prejudice of the appellant in giving to the jury certain instructions which were in substance as follows:

(a) “Therefore, if you are satisfied beyond a reasonable doubt by the evidence in this case that the defendant had possession of this narcotic drug and he has not explained that possession to your satisfaction you may find him guilty of a violation of the statute.

(b) “That means, that the only question before the jury in this case; the only question before the jury is a question which arises out of the conflict. The Narcotic Agents have testified that they saw defendant in the possession of the narcotic heroin in question. The defendant has denied that. If you are satisfied beyond a reasonable doubt that the Narcotic Agents have told the truth you may bring in a verdict of guilty. If, on the contrary, you are not satisfied beyond a reasonable doubt that they have told the truth you may then bring in a verdict of not guilty.”

VI.

That this Court erred in denying the defendant's motion for a new trial.

VII.

That the Court erred in denying defendant's motion in arrest of judgment.

DESIGNATION OF PORTIONS OF RECORDS
DEEMED NECESSARY FOR CONSIDER-
ATION ON APPEAL

The entire Clerk's Transcript of Record.

The entire Reporter's Transcript of Proceedings.

All Exhibits.

(Original exhibits to be used in consideration of this appeal without reproduction in the record.)

The foregoing statement of points on appeal and designation of portions of the records which appellant deems necessary for the consideration of said appeal is respectfully presented and filed in compliance with Rule 19, Subdivision 6, of the Rules of Procedure of the United States Circuit Court of Appeals for the Ninth Circuit.

/s/ JAMES B. O'CONNOR,
Attorney for Appellant.

[Endorsed]: Filed June 17, 1947.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION DISPENSING WITH PRINT-
ING OF ORIGINAL EXHIBITS

It Is Hereby Stipulated by and between counsel for appellant and counsel for appellee that the original exhibits to be used on the consideration of

this appeal need not be reproduced in the record herein.

Dated: June 17th, 1947.

/s/ FRANK J. HENNESSY,

/s/ JAMES D. DAVIS,

Attorneys for Appellee.

/s/ JAMES B. O'CONNOR,

Attorney for Appellant.

[Endorsed]: Filed June 18, 1947.

[Title of Circuit Court of Appeals and Cause.]

ORDER DISPENSING WITH PRINTING
OF ORIGINAL EXHIBITS

Upon consideration of the stipulation of counsel for the respective parties hereto that the original exhibits in the above-entitled case need not be printed as part of the printed transcript of record but may be considered by this Court in their original form; and good cause appearing therefor,

It is Hereby Ordered that the said application be and it is hereby granted and that the original exhibits in this cause need not be printed as part of the printed transcript but may be considered in their original form.

Dated: June 18, 1947.

/s/ FRANCIS A. GARRECHT,

United States Circuit Court
Judge.

[Endorsed]: Filed June 18, 1947.

No. 11,619

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH PITTA,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

JAMES B. O'CONNOR,

1101 Balfour Building, San Francisco,

Attorney for Appellant.

FILED

AUG 28 1947

PAUL P. O'BRIEN,

CLERK

Subject Index

	Page
Jurisdictional statement	1
Statement of the case	2
A summary of the evidence	5
Summary statement of points on appeal.....	6
Argument	7
I. The trial court should have granted appellant's motion for an instructed verdict of not guilty because of the insufficiency of the evidence.....	7
II. The trial court erred in instructing the jury.....	12
Conclusion	14

Table of Authorities Cited

Cases	Pages
Colbough v. United States, 15 Fed. (2d) 929, 931.....	10
Pon Wing Quong v. U. S., 111 Fed. (2d) 751, 756.....	8
Rosenberg v. U. S., 13 Fed. (2d) 369.....	9
State v. Lane (Mo.), 297 S. W. 708.....	12
United States v. Bookbinder, 281 Fed. 207-210.....	8
United States v. Hororowicz, 105 Fed. (2d) 718.....	10
United States v. Pape, 144 Fed. (2d) 778, 791.....	13
Yee Hem v. U. S., 268 U. S. 178.....	9

Statutes

Harrison Narcotic Act, 26 U.S.C.A. Sections 2553 and 2557	1
Jones-Miller Act, 21 U.S.C.A. 174.....	1, 7, 9, 12, 14
18 U.S.C.A. Section 88	1
28 U.S.C.A. Section 41, subdivision 2	1
28 U.S.C.A. Section 225(a) and (d).....	2

No. 11,619

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

JOSEPH PITTA,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction in the United States District Court for the Northern District of California, Southern Division.

The offenses charged in the Indictment are violations of the Narcotic Laws of the United States, the Jones-Miller Act, 21 U.S.C.A. Section 174, the Harrison Narcotic Act, 26 U.S.C.A. Sections 2553 and 2557, and conspiracy, 18 U.S.C.A. Section 88, to violate the Jones-Miller Act, 21 U.S.C.A. Section 174. The District Court had jurisdiction under 28 U.S.C.A. Section 41, subd. 2.

This Court has jurisdiction to review the judgment of the District Court under the provisions of 28 U.S.C.A. Section 225(a) and (d).

The pleadings necessary to show the evidence of jurisdiction are

- (a) The Indictment (R. 2-33);
 - (b) Judgment and Commitment (R. 37-38);
 - (c) Notice of Appeal (R. 39-40);
 - (d) Statement of Points on Appeal (R. 163-165).
-

STATEMENT OF THE CASE.

Joseph Pitta, the Appellant, was indicted by the Grand Jury for the Northern District of California, Southern Division, on September 18, 1946.

The Indictment charged Appellant and others in Fifty-six counts with violations of the Narcotic Laws of the United States, viz., the Jones-Miller Act, the Harrison Narcotic Act and Conspiracy to violate the Jones-Miller Act. The Indictment contained Fifty-six Counts. Of these Fifty-five were substantive counts, only one of which, the twenty-third, charged Appellant, Joseph Pitta. The conspiracy count, the Fifty-sixth or last count in the Indictment, is the usual all embracing conspiracy charge in which all defendants named in the substantive counts are charged with conspiracy to violate the statutes which are the basis of the substantive counts.

It is to be noted that the Appellant is named in only one substantive count, the twenty-third, and is mentioned in only one of the twenty-four overt acts charged in the conspiracy count, namely, the thirteenth.

The Indictment in general, both the substantive and conspiracy counts, evolve around alleged violations of the Federal Narcotic Acts committed in the City and County of San Francisco, in the jurisdiction of the District Court.

In general, the Indictment covers a series of alleged transactions built around a bar room known as the Star Dust Bar, located at 1098 Sutter Street in San Francisco. The indictment charges these transactions or violations to have occurred during a period of time between January 5th, 1946 and March 1st, 1946.

The substantive count with which the Appellant was charged and upon which he was convicted, viz. the twenty-third count, alleged:

“That Vincent Bruno and Joseph Pitta on or about the 10th day of January, 1946 in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.”

On December 2d, 1946, the Appellant entered his plea of not guilty (R. 33-34).

On April 22d, 1946, the case of Appellant proceeded to trial, at which time on motion of the United States Attorney the Appellant went to trial on all counts in the Indictment, save and except the conspiracy count. The Court at this time granted a severance of some sort, and ordered Appellant to trial (R. 34-35).

The Appellant's case was tried to a jury on April 22d, 1946 (R. 35-36).

The jury returned a verdict finding Appellant guilty on the twenty-third count of the Indictment on April 23d, 1946 (R. 36).

The Appellant upon the verdict of guilty on the twenty-third count of the Indictment was sentenced to a term of two years of imprisonment and a fine of One Dollar (\$1.00). Judgment was imposed on April 23d, 1946 (R. 37, 38).

Appellant moved the Court for an instructed verdict of not guilty at the conclusion of the Government's case, which motion was denied (R. 112-117).

At the conclusion of the Government's case, on motion of the United States Attorney, all counts of the Indictment except the twenty-third count were dismissed (R. 116-117).

A SUMMARY OF THE EVIDENCE.

The Federal Narcotic Agents testified that during the month of January and February 1946, they had under observation a bar room in the City and County of San Francisco known as the Star Dust Bar.

That on the 10th day of January, 1946, they had secreted themselves in a room in the rear of the Star Dust Bar, from which position they had at all times a liquor storeroom of the Star Dust Bar under observation.

At about Seven-thirty on the evening of January 10th, one of the agents entered the liquor storeroom and removed from between some beer cases a paper. The agents took from this paper a small quantity of a powder and then one of the agents refolded the paper and returned it to its place of concealment. The powder which they took from the paper was identified by a Government chemist as heroin hydrochloride.

Later that evening at about 10:45 p. m. the agents observed Vince Bruno, a defendant named in the Indictment with Appellant enter the liquor storeroom from the rear of the Star Dust Bar with Appellant. Bruno locked the door behind him. Bruno removed the paper the agents had previously examined from between the beer cases, opened the paper and using a penknife took some of the contents of the paper and with the penknife snuffed the contents into his nostrils. Bruno then passed the paper to Appellant with the knife. Appellant then took some of the substance on the knife and inhaled it into his nostrils. Appellant

refolded the paper and returned it with the penknife to Bruno who replaced it between the beer cases.

The above constituted the case of the Government.

The Appellant called certain witnesses to testify concerning the physical makeup of the room in question with the end in view of showing that the Government agents could not have seen what they testified to. No point is being made to this effect on this appeal.

The Appellant was called as a witness on his own behalf. He testified that over a period of a couple of years he had gone to the Star Dust Bar to exchange liquor on about two to four times. That he was never there as late as 10:30 at night and that he did not know whether he was there on January 10th. He said he was in the bar and restaurant business in Oakland and also took care of his father's ranching properties. He said he had been convicted of felony in 1940 in San Diego. He denied being in the liquor room of the Star Dust Bar on January 10, 1946 with Vince Bruno and using a bindle of heroin. He denied he possessed a bindle of heroin at that time.

SUMMARY STATEMENT OF POINTS ON APPEAL.

The Appellant, in support of his contention that the judgment of conviction against him should be reversed, contends and will argue:

1. The Trial Court should have granted his motion for an instructed verdict of not guilty because of the insufficiency of the evidence;
2. The Trial Court erred in instructing the jury.

ARGUMENT.**I. THE TRIAL COURT SHOULD HAVE GRANTED APPELLANT'S MOTION FOR AN INSTRUCTED VERDICT OF NOT GUILTY BECAUSE OF THE INSUFFICIENCY OF THE EVIDENCE.**

The Appellant in the twenty-third count of the indictment was charged with "fraudulently knowingly concealing and facilitating the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin in quantity particularly described as one bindle containing approximately one dram of heroin * * * which had been imported into the United States of America contrary to law" in violation of the Jones-Miller Act, 21 U.S.C.A. 174.

This is the only count upon which Appellant was convicted. It is the Appellant's contention that as a matter of law the evidence was insufficient to sustain his conviction and therefore a directed verdict should have been granted.

The question to be determined by this Court, we believe, can best be stated as follows:

Does the taking of an injection or inhalation of an illicit narcotic drug by a person constitute a violation of the Jones-Miller Act?

It is the position of Appellant that the evidence taken in the most favorable light for the Government, as it must here, shows Appellant did nothing more than take into his nostrils a portion of heroin given him by his co-defendant Bruno. This, we maintain, was not a violation of Title 21 U.S.C.A. Section 174.

The particular Count upon which Appellant was convicted charged him with the concealing and facilitating the concealment of a bindle of heroin.

To conceal has been defined as “To hide or withdraw from observation, to prevent the discovery of; to withhold knowledge of.”

United States v. Bookbinder, 281 Fed. 207-210.

This circuit in *Pon Wing Quong v. United States*, 111 Fed. (2d) 751, 756, in construing the same Jones-Miller Act determined the word “facilitate” as used in this statute to have the common and ordinary dictionary meaning. This court said:

“Since the term ‘facilitate’ seems not to have any special legal meaning, the framers of this statute must have had in mind the common and ordinary definition as expressed by a standard dictionary. Quoting from Webster’s Unabridged Dictionary, ‘facilitate’ is defined as follows: ‘To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task.’ ”

Having in mind the definitions given for the words “conceal” and “facilitate,” did this Appellant either conceal or facilitate the concealment of the heroin mentioned in the twenty-third count of the indictment?

The particular heroin, according to all of the evidence, had been secreted prior to the Appellant ever being in the liquor room of the Star Dust Bar. It had been secreted and it had been discovered. The narcotic officers discovered it prior to ever seeing the

Appellant in the liquor store room. The Appellant did not conceal it, nor did he do anything to facilitate its concealment. The only act of the Appellant in connection with the whole transaction was the taking of a portion of the heroin from defendant Bruno and inhaling some of it.

We submit the evidence is not susceptible to the construction that Appellant either concealed or facilitated the concealment of the heroin mentioned in the count upon which he was convicted.

But the particular section of the Jones-Miller Act with which we are concerned, Section 174 of Title 21 U.S.C.A., contains the following provision:

“* * * Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the Jury.”

This presumption contained in the statute has been held constitutional.

Yee Hem v. U. S., 268 U.S. 178;

Rosenberg v. U. S., 13 Fed. (2d) 369.

The trial court in the instant case instructed the jury in accord with this presumption.

Now the question arises, does the evidence in this case sustain the view that this Appellant was in possession of the heroin alleged to have been concealed by him in the twenty-third count of the indictment.

It is Appellant's position that he did not have such possession and therefore the presumption contained in the statute was not applicable to him.

Possession is defined in Webster's International Dictionary as follows: "The having, holding or detention of property in one's power or command; actual seizin or occupancy; ownership, whether rightful or wrongful."

Did the Appellant by the act of taking an inhalation of a narcotic drug have such possession as such word is commonly understood or as contemplated by the statute in question?

We have been unable to find any case exactly in point under the Jones-Miller Act. This is the first time, as far as we know, that the precise question has been before an Appellate Court.

Did the Appellant have such dominion and control of the heroin charged in the indictment as gave him the power of disposal? The evidence does not sustain this view. Yet in *United States v. Horowitz*, 105 Fed. (2d) 218, in construing possession of liquor under the internal revenue laws the court said:

"Possession is the exercise of such a power over a thing as attaches to lawful ownership or as was said in *Toney v. United States*, 62 App. D. C. 307, 67 F. (2d) 573, 574, the possessor 'must have had such dominion and control of the liquor as would give him the power of disposal.' "

In *Colbough v. United States*, 15 F. (2d) 929, 931, the circuit court for the eighth circuit discusses pos-

session of liquor by one merely taking a drink from a bottle and we think this case should control the disposition of this appeal. The court said:

“The evidence does not even show that defendant had, or had ever had, such possession of the bottle of whisky as is connoted by merely taking a drink therefrom upon invitation of the owner of the whisky; on the contrary, the evidence is uncontradicted that defendant was arrested before he took the drink, for which he says he had gone to the place of arrest. Even if he had, the weight of the authorities is that such fact does not constitute criminal possession. *Brazeale v. State*, 133 Miss. 171, 97 So. 525; *State v. Munson*, 111 Kan. 318, 206 P. 749; *Sizemore v. Com.*, 202 Ky. 273, 259 S. W. 337; *Harness v. State*, 130 Miss. 673, 95 So. 64; *Anderson v. State*, 132 Miss. 147, 96 So. 163; *People v. Ninehouse*, 227 Mich. 480, 198 N. W. 973; *State v. Jones*, 114 Wash. 144, 194 P. 585.

“Possession of liquor, as of other instruments and fruits of crime, involves knowledge, dominion, and control, with plenary power of disposal in the alleged possessor. *Grantello v. U. S.* (C.C.A.) 3 F. (2d) 117; *Patrilo v. United States* (C.C.A.) 7 F. (2d) 804. Absent the power of disposal, either sole or joint, with Cope, the mere fact that defendant knew Cope had the whisky would not make defendant guilty, since criminal possession requires more than knowledge of possession in another. *Patrilo v. United States*, *supra*; *People v. Archer*, 220 Mich. 552, 190 N. W. 622; *People v. Germaine*, 234 Mich. 623, 208 N. W. 705.”

In *State v. Lane* (Mo.), 297 S. W. 708, the court held the mere holding another's bottle of whiskey momentarily while taking a drink not possession sufficient to justify conviction under revenue laws of that state relative to the possession of intoxicating liquor.

We submit that the Appellant did not conceal or facilitate the concealment of the narcotic drug charged against him. That he did not have such possession as intended by the statute in question or as possession has been defined by the courts.

The mere taking of an inhalation of an illicit drug in possession of another is not a violation of the Jones-Miller Act.

The evidence is insufficient as a matter of law to sustain Appellant's conviction and the trial court should have instructed a verdict of not guilty.

II. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY.

The Trial Court instructed the jury as follows:

“That means that the only question before the jury in this case is this: the only question before the jury is a question which arises out of this conflict; the narcotic agents of the United States have testified that they saw the defendant in the possession of the narcotic here in question. The defendant has denied that. *If you are satisfied beyond a reasonable doubt that the narcotic agents have told the truth, you may bring in a verdict of guilty. If, on the contrary, you are not satisfied beyond a reasonable doubt that they have told the*

truth, you may bring in a verdict of not guilty."
(R. 160).

This instruction, we submit, was erroneous in that it limited the jury to a consideration of the testimony of the narcotic agents and eliminated from their consideration the testimony of the Appellant and the witnesses who testified in his behalf.

The instruction, in effect, told the jury they were to base their verdict on whether they had or had not a reasonable doubt as to the veracity of the narcotic agents. This, we submit, is not the law.

The jury has the right to consider all of the evidence offered in the case and if after such consideration they are convinced of a defendant's guilt beyond a reasonable doubt they should convict; if not, they should acquit.

In *United States v. Pape*, 144 Fed. (2d) 778, 791, the Circuit Court for the Second Circuit said:

"The Judge has an overall duty to decide whether the case is strong enough under the applicable rules of law to go to the jury at all, and then he must admonish the jury of its duty to free the accused if upon all the evidence it is not convinced of guilty beyond reasonable doubt."

In the instant case, the Court in effect told the jury if they believed the narcotic agents had told the truth they should convict. The Appellant denied he was present at the time the agents said he was in the Star Dust Bar liquor room. This denial the Court eliminated from the jury's consideration. The agents

could have been telling the truth and yet have been honestly mistaken as to the identity of Appellant. The jury were limited to a consideration of the Government's testimony.

This instruction was erroneous. True, the error was not called to the Court's attention at the conclusion of the instructions. But this Court has the power to notice such error despite this fact in a proper case. This, we submit, is such a case. Here, the Appellant was subject to the presumption arising from the Jones-Miller Act and then the Court in effect eliminates by the complained of instruction, any explanation by Appellant to offset this presumption.

CONCLUSION.

We respectfully submit that because of

(1) The failure of the trial court to instruct a verdict of not guilty, and

(2) The erroneous instruction given the jury the judgment of the Trial Court should be reversed.

Dated, San Francisco,

August 28, 1947.

Respectfully submitted,

JAMES B. O'CONNOR,

Attorney for Appellant.

No. 11,619

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOSEPH PITTA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

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FILED

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PAUL H. O'BRIEN,

CLERK

Subject Index

	Page
Jurisdictional statement	1
Statement of facts	2
Questions	4
1. Is the possession of narcotics for the purposes of use sufficient to justify conviction?	4
2. Was the jury improperly instructed?	4
Argument	4
I. Possession for purposes of use is sufficient to justify conviction	4
II. The jury was properly instructed	10
Conclusion	14

Table of Authorities Cited

Cases	Pages
Charley Toy v. U. S., 266 F. 326, cert. den. 254 U. S. 639..	6
Gee Woe v. United States, 250 F. 328, cert. den. 248 U. S. 562	4
Gonzales v. United States, 162 F. (2d) 870.....	7
Hargreaves v. U. S., 75 F. (2d) 68, cert. den. 295 U. S. 759	13
Hooper v. U. S. (CCA-9), 16 F. (2d) 868.....	4, 6
Morrissey v. U. S. (CCA-9), 67 F. (2d) 267, cert. den. 293 U. S. 566	13
Ng Choy Fong v. U. S. (CCA-9), 245 F. 305, cert. den. 245 U. S. 669	4, 7, 8
Pon Wing Quong v. U. S. (CCA-9), 111 F. (2d) 751.....	5
Rosenberg v. U. S. (CCA-9), 13 F. (2d) 369.....	4
Sunquist v. U. S. (CCA-9), 3 F. (2d) 433.....	13
U. S. v. Feinberg, 123 F. (2d) 425, cert. den. 315 U. S. 801	6
U. S. v. Moe Liss, 105 F. (2d) 144.....	6
Yee Hem v. U. S., 268 U. S. 178.....	6

Statutes

21 United States Code, Section 173	7
21 United States Code, Section 174	1, 4
28 United States Code, Section 41, subdivision 2	2
28 United States Code, Section 225, subdivisions (a) and (d)	2

No. 11,619

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

JOSEPH PITTA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from the judgment of conviction (Tr. 36) of the District Court of the United States for the Northern District of California, Southern Division, convicting the defendant after a jury trial, of a violation of the Jones-Miller Act (21 U.S.C. §174). The indictment was in 56 counts and charged the appellant and others, with violations of the narcotic laws of the United States and with conspiracy. The appellant went to trial on one count of this indictment, to-wit, the 23rd count, which alleged in substance that the appellant and one Vincent Bruno, on or about the 10th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative

and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew (Tr. 13 and 34-36).

The Court below had jurisdiction under the provisions of Title 28 U.S.C. §41, sub-division 2. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28, U.S.C. §225, sub-divisions (a) and (d).

STATEMENT OF FACTS.

The Federal Narcotic Agents testified that during the month of January and February, 1946, they had under observation a bar room in the City and County of San Francisco known as the Star Dust Bar.

That on the 10th day of January, 1946, they had secreted themselves in a room in the rear of the Star Dust Bar, from which position they had at all times a liquor storeroom of the Star Dust Bar under observation.

At about seven-thirty on the evening of January 10th, one of the agents entered the liquor storeroom and removed from between some beer cases a paper. The agents took from this paper a small quantity of a powder and then one of the agents refolded the paper and returned it to its place of concealment. The powder which they took from the paper was identified by a Government chemist as heroin hydrochloride.

Later that evening, about 10:45 p.m., the agents observed Vincent Bruno enter the liquor storeroom from the rear of the Star Dust Bar with appellant. Bruno locked the door behind him. Bruno removed the paper the agents had previously examined from between the beer cases, opened the paper and, using a penknife, took some of the contents of the paper and with the penknife snuffed the contents into his nostrils. Bruno then passed the paper and the knife to appellant. Appellant then took some of the substance on the knife and inhaled it into his nostrils. Appellant refolded the paper and returned it with the penknife to Bruno who replaced it between the beer cases.

The above constituted the case of the Government.

The appellant called certain witnesses to testify concerning the physical makeup of the room in question with the end in view of showing that the Government agents could not have seen what they testified to. No point is being made to this effect on this appeal.

The appellant was called as a witness on his own behalf. He testified that over a period of a couple of years he had gone to the Star Dust Bar to exchange liquor about two to four times. That he was never there as late as 10:30 at night and that he did not know whether he was there on January 10th. He said he was in the bar and restaurant business in Oakland and also took care of his father's ranching properties. He said he had been convicted of felony in 1940 in San Diego. He denied being in the liquor room of

the Star Dust Bar on January 10, 1946 with Vincent Bruno and using a bindle of heroin. He denied he possessed a bindle of heroin at that time.

QUESTIONS.

1. Is the possession of narcotics for the purposes of use sufficient to justify a conviction?
2. Was the jury improperly instructed?

ARGUMENT.

I. POSSESSION FOR PURPOSES OF USE IS SUFFICIENT TO JUSTIFY A CONVICTION.

It has been held uniformly that the possession of narcotics is sufficient to justify conviction, under the presumption raised by the statute,¹ unless the defendant explains his possession to the satisfaction of the jury.

Ng Choy Fong v. United States (CCA-9), 245 F. 305, certiorari denied 245 U. S. 669;

Rosenberg v. United States (CCA-9), 13 F. (2d) 369;

Hooper v. United States (CCA-9), 16 F. (2d) 868;

Gee Woe v. United States, 250 F. 428, certiorari denied 248 U. S. 562.

¹“* * * Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.” (21 U.S.C. §174.)

Therefore, having once proved possession of the narcotics in the defendant, it is not necessary for the Government to go further and prove that the acts of the defendant amounted to "concealment" or "facilitating the concealment" of the narcotics as these terms may be defined in the dictionary. The proof of possession immediately raises the presumption, which the defendant must rebut. The case of *Pon Wing Quong v. United States* (CCA-9), 111 F. (2d) 751, cited by the appellant, in our opinion, serves to emphasize this point. In that case the defendant was not shown to ever have had actual possession of the narcotics. The only evidence introduced against him, other than his confession, was to the effect that he, a baggageman, had placed a sticker upon a trunk containing the narcotics for the purpose of having it released from the baggage corral without customs inspection. Under these facts it became necessary for the Court to analyze the language of the charging portion of the statute to determine if the defendant's actions amounted to "importation" or "facilitating the transportation or concealment" of the narcotics. Had it been shown that the defendant had been in possession of the trunk or its contents this question would not have arisen as the presumption would have been sufficient to justify conviction.

Appellant seems to argue that there are degrees of possession; that possession for purposes of use is different from possession for purposes of sale, or purposes of transportation or any other similar purpose. We do not believe that the statute is susceptible of such an interpretation.

First. The language of the statute is clear and unequivocal. The word “possession” is unqualified. Possession itself must be “explained to the satisfaction of the jury”.

Second. The language used in the statute merely enacts a rule of evidence that proof of one fact shall constitute *prima facie* evidence of the main fact in issue. Therefore, inquiry into the “degree” of possession is idle.

Yee Hem v. United States, 268 U. S. 178;

Charley Toy v. United States, 266 F. 326, certiorari denied 254 U. S. 639.

Third. No one of the cases touching upon this point questions the “degree” or the “quality” of the possession. On the contrary, they assume that possession is sufficient proof of guilt unless the defendant proves that his possession was lawful. Note that it is not sufficient for the defendant to prove that his possession was “temporary” or “limited” or “qualified” but he must prove it was “lawful”.

Hooper v. United States (CCA-9), 16 F. (2d) 868;

U. S. v. Feinberg, 123 F. (2d) 425, certiorari denied 315 U. S. 801;

U. S. v. Moe Liss, 105 F. (2d) 144.

In the latter case the Court said, at page 146:

“So it is accurate to say that the explanation of possession, if it is to serve the defendant’s purpose, must not only be believed by the jury but must also be one that shows a possession lawful under the statute, *citing cases*. It goes without

saying that Congress did not intend that an explanation which showed guilty knowledge by the defendant would suffice.”

In *Gonzales v. United States*, 162 F. (2d) 870, decided by this Court on June 20, 1947, Judge Stephens said:

“A mere reading of the above-quoted language (quoting from *Yee Hem v. United States*, 268 U. S. 178) clearly shows that the satisfaction of the jury as to the explanation *turns upon whether or not the possession was within the exceptions provided in the statutes.*” (Emphasis supplied.)

Possession for the purpose of illegal use by a narcotic addict is clearly not within the exceptions provided in 21 U.S.C. §173, which permits the importation of such amounts of narcotics as the “Board finds to be necessary to provide for medical and legitimate uses only”.

Fourth. The purpose of the statute, as explained by the decisions, makes it clear that Congress intended *any* possession to be sufficient to raise the presumption and to place upon the defendant the burden of proving lawful possession.

In *Ng Choy Fong v. United States* (CCA-9), 245 F. 305, certiorari denied 245 U. S. 669, this Court said:

“* * * in order to make the law as effective as might be, Congress, in its wisdom, meant to facilitate the practical administration of the statute by establishing these rules: (1) That if, upon trial, a person is shown to have had opium il-

legally imported in his possession, such possession shall be deemed enough evidence to authorize conviction unless such possessor shall explain the possession to the satisfaction of the jury. (2) That after July 1, 1913, all opium found shall be presumed to have been imported since April 1, 1909, and the accused must take it upon himself to rebut this presumption."

The Supreme Court in *Yee Hem v. United States*, 268 U. S. 178, recognized the purpose of the presumption when it said at page 184:

"* * * By universal sentiment, and settled policy as evidenced by state and local legislation for more than half a century, opium is an illegitimate commodity, the use of which, except as a medicinal agent, is rigidly condemned. Legitimate possession, unless for medicinal use, is so highly improbable that to say to any person who obtains the outlawed commodity 'since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful importation, or your knowledge of it,' is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress."

Fifth. The whole purpose of the statute is to stamp out the very existence of narcotics in the United States except for legitimate medicinal purposes. See *Ng Choy Fong v. United States*, 245 F. 305. (It may be worthwhile to note that heroin, the drug involved

in this case, both in fact and under the regulations of the Treasury Department has no legitimate medical use and is absolutely prohibited in the United States.) While we sympathize with the unfortunate addict, who is a victim of his own weakness, we must also realize that the addict is the principal reason for the existence of illegal narcotics and the sole reason for the presence of the seller in our midst. Proper and efficacious enforcement of the law demands the elimination of the user as well as the purveyor. Keeping in mind the obvious purpose of Congress in enacting the law and the goal which it aimed to achieve, it is unlikely that it intended to make possession for purposes of sale or any other purpose *prima facie* evidence of guilt and, at the same time, permit possession for purposes of use to be innocent.

We do not believe that the cases relied upon by the appellant, all arising under liquor control laws either of the State or Federal Government, are applicable in the case at bar. In those cases the Courts were concerned with a problem of *substantive* law, i.e., the criminal possession of liquor, and it became necessary to define the type of possession which would constitute a crime. There are many similar statutes, such as possession of stolen government property, of property stolen in interstate commerce and of property stolen from the mails. It may well be that the Courts in determining guilt under such statutes may say that the possession sufficient to justify conviction must be of a certain character; that, for example, it must show dominion and control rather than mere momentary

possession for the purpose of inspection or examination.

In the instant case, as stated above, however, we are not concerned with a question of *substantive* law but with a rule of evidence. We do not argue that under the statute in question possession of narcotics, for any purpose, is itself a crime but rather that possession “shall be deemed *sufficient* evidence to authorize conviction” (of the crime of concealing or facilitating the concealment of narcotics) “unless the defendant explains the possession to the satisfaction of the jury”.

Considered in this light, what greater “degree” of possession can one have than a possession which entitles the possessor to consume that which he possesses?

II. THE JURY WAS PROPERLY INSTRUCTED.

Appellant's objections to the instruction complained of are three-fold. First, that it limited the jurors to a consideration of the Government's testimony, disregarding that of the defense. Second, that it eliminated from the jury's consideration the possibility that the government's witnesses might be mistaken. Third, that it prevented the consideration of the appellant's “explanation” of his possession of the narcotics.

An analysis of the instruction shows that the first difficulty is an imaginary one. The agents testified that the appellant was in a certain room at a certain

time and in possession of narcotics. The appellant denied that he was in the room at that time and that he had narcotics in his possession. As the Court said, the case revolved about a simple issue of fact; either the agents saw the appellant in possession of narcotics or they did not. Hence, a flat contradiction was established; both stories could not possibly be true. Therefore, in order for the jury to believe that the agents told the truth they must necessarily have believed that the appellant did not tell the truth. Instead of disregarding the appellant's testimony, the jury would have to consider and reject it in order to believe that the agents told the truth. In effect, the instruction stated "You have heard two stories; both cannot be true. In order to believe one you must reject the other. If you believe that the Agents told the truth and that they saw the appellant at the time and place mentioned and in possession of narcotics, you must reject the appellant's statement that he was not there and bring in a verdict of guilty. If on the other hand, you do not believe that the Agents told the truth and that they did not see the appellant, you may believe the appellant's statement that he was not there and you may bring in a verdict of not guilty".

The second objection, that the instruction eliminated the possibility that the agents might be mistaken, upon close scrutiny, also seems more chimerical than real. As an abstract philosophical problem it is interesting but as a practical, legal objection it is without merit.

According to one school of thought it would be impossible for the agents to have told the truth and to

have been mistaken as to the facts upon which they based their conclusion. Another would recognize the possibility of their having been mistaken and still having told the truth as they saw it. In common usage, however, the phrase "If you believe the agents told the truth" coupled with the instructions on the presumption of innocence and on reasonable doubt, conveyed to the jury the idea that in arriving at their conclusion they need not rule out the possibility of mistake. In its deliberations a jury is concerned with the "truth" of objective facts and not with abstract truth. It does not seem plausible, in our opinion, that the language of this instruction foreclosed the jury from considering the possibility that the agents might be mistaken. If it did not, there is no error, as it cannot be maintained that the Court should have gone further and explicitly cautioned the jury to beware of the possibility of mistake.

The final objection, that the instruction eliminated any explanation by the appellant to offset the presumption raised by the possession of narcotics is, in our opinion, entirely without merit. The necessity of explaining possession of narcotics to the satisfaction of the jury, i.e., proving that the possession was lawful or innocent, can only arise where the defendant admits possession and then goes further to explain it. To "explain" that you had lawful possession of something which you deny having possessed is a logical impossibility.

It is an accepted principle that instructions should be construed as a whole and that detached phrases

and sentences should not be singled out and considered alone in determining the correctness of the instructions.

Morrissey v. United States (CCA-9), 67 F. (2d)

267, certiorari denied 293 U. S. 566;

Hargreaves v. United States, 75 F. (2d) 68,

certiorari denied 295 U. S. 759.

If we apply these principles to the case at bar and read the charge to the jury in its entirety it becomes clear that the jury was properly instructed.

Furthermore, an instruction of identical import has been approved by this Circuit. In *Sunquist v. United States* (CCA-9), 3 F. (2d) 433, the following instruction was held to be proper:

“* * * the evidence introduced by the government, if believed by you, is sufficient to warrant and sustain a verdict at your hands of guilty.”

Finally, no objection was taken to the instruction in the trial Court. Rule 30 of the Rules of Criminal Procedure, which codifies the ruling case law on this point and prohibits the assignment of error where no objection is taken, should be followed.

CONCLUSION.

For the reasons stated we respectfully submit that the conviction should be affirmed.

Dated, San Francisco, California,
October 24, 1947.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

JAMES T. DAVIS,

Assistant United States Attorney,

Attorneys for Appellee.

No. 11620

United States
Circuit Court of Appeals
For the Ninth Circuit.

THEODORE F. BOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

JUN - 7 1947

PAUL P. O'BRIEN,
CLERK

No. 11620

United States
Circuit Court of Appeals
For the Ninth Circuit.

THEODORE F. BOVICH,
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer of Respondent U. S. of A.....	10
Appeal:	
Certificate of Clerk to Transcript of Record on (DC)	34
Citation on.....	2
Order Allowing.....	27
Petition for Allowance of.....	26
Praecipe for Apostles on	32
Assignment of Errors	28
Certificate of Clerk (CCA)	121
Certificate of Clerk to Transcript of Record on Appeal (DC).....	34
Citation on Appeal.....	2
Designation of Parts of Record to be Printed and Points Relied on.....	122
Exhibits, Libelant's:	
No. 1—Certificate of Hospital and Outpatient Treatment.....	71
No. 2—Seaman's Wage Account.....	74
Final Decree	25
Findings of Fact and Conclusions of Law	18

Conclusions of Law	23
Findings of Fact.....	19
Libel	4
Names and Addresses of Attorneys	1
Opinion	14
Order	18
Order Allowing Appeal	27
Petition for Allowance of Appeal.....	26
Præcipe for Apostles on Appeal.....	32
Reporter's Transcript of Proceedings.....	35
Witnesses, Libelant:	
Bovich, Theodore F.	
—direct	107
Eaves, Dr. James	
—direct	101
—cross	107
Kazem-Beck, Alexander N. M.	
—direct	39
—cross	57
—redirect	59
—recross	62
Witnesses, Plaintiff's:	
Bovich, Theodore F.	
—direct	63
—cross	83

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United States District Court for the Northern
District of California, Southern Division

No. 24525-S

THEODORE F. BOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

CITATION ON APPEAL

United States of America—ss.

The President of the United States of America to
United States of America, Greeting:

You Are Hereby Cited and Admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, In Admiralty wherein Theodore F. Bovich is the appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Michael J. Roche, United States District Judge for the Northern District of California, Southern Division, this 28th day of April, A. D. 1947.

.....,

United States District Judge.

Receipt of a copy of the within citation and admission of service is hereby acknowledged this 29th day of April, 1947.

/s/ FRANK J. HENNESSY,

U. S. Attorney Per T. S.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Proctors for Respondent and
Appellee.

[Endorsed]: Filed April 29, 1947.

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, in Admiralty

No. 24525 S

(Seaman's Action)

THEODORE F. BOVICH,

Libelant,

vs.

UNITED STATES OF AMERICA, a Nation,
Respondent.

LIBEL

(Damages for Personal Injuries—\$25,000.00)

The libel of Theodore F. Bovich, late a sea-
man on board the American steamship "Charles J.
Colden," against the above-named respondent, in a
cause of libel, civil and maritime, for damages for
personal injuries, alleges as follows:

1. That the libelant is now and was at all times
herein mentioned a resident of the County of Ala-
meda, State, and Northern District, of California.

2. That the respondent is now and was at all
times herein mentioned a nation.

3. That the War Shipping Administration is
now and was at all times herein mentioned an
agency of said United States of [1*] America.

4. That, as libelant is informed and believes and
therefore alleges, the respondent is now and was at
all times herein mentioned the owner and operator

* Page numbering appearing at foot of page of original certified
Transcript of Record.

of the steamship "Charles J. Colden," which vessel is now and was at all times herein mentioned employed and engaged as a merchant vessel of the United States Merchant Marine.

5. That at all times on and about the 3rd day of January, 1945, and at the time libelant was injured as hereinafter set forth, libelant was employed by the respondent United States of America, through the War Shipping Administration, as a seaman, to wit, as an able-bodied seaman, on board said steamship "Charles J. Colden," and libelant was at all of said times working on board said steamship in the course of his said employment; that at all times on and about said 3rd day of January, 1945, said steamship "Charles J. Colden" was afloat on navigable waters at Oro Bay, New Guinea.

6. That on or about the 3rd day of January, 1945, respondent was engaged in loading said vessel and in the course of said loading was loading large, heavy crates upon the main deck of said vessel; that at said time respondent negligently failed to have any licensed or other officer overseeing or supervising said loading of said vessel; that at said time the boatswain of said vessel was an employee of the respondent and the superior officer of libelant whose orders libelant was compelled to obey; that at said time said boatswain negligently ordered libelant to carry a garbage can on said main deck between large, heavy crates thereon, although there was no clear, open, nor safe passageway on said deck through which libelant could carry said garbage can in accordance with said order without danger of

being injured in said loading of said vessel; that respondent negligently failed to have such a clear, open, and safe passageway for libelant to [2] carry out such order, and respondent negligently failed to furnish libelant with a safe place to work in that there was no clear, open, nor safe passageway, as aforesaid; that at said time, and in obedience to said negligent order, libelant was carrying said garbage can along said deck between two of said crates when respondent negligently caused and permitted a large crate being loaded on said deck and being carried by ship's gear, to strike against another large crate, thereby causing said last-mentioned crate to strike against and to crush the lower part of libelant's right leg and ankle between the said last-mentioned crate and said garbage can, whereby libelant was made weak, sick, sore, lame, and disabled, and caused to suffer contusions, bruises, and lacerations of his right leg, a compound fracture of his right tibia and right ankle, punctured arteries of said leg, damage to the nerves of said leg and ankle, and great nervous shock; that the aforesaid negligence of respondent directly and proximately caused libelant to be injured as aforesaid;

That because of said injuries, libelant has ever since receiving the same been weak, sick, sore, stiff, lame, and disabled, and always will be weak, sick, sore, stiff, lame and disabled;

That because of said injuries, libelant has ever since receiving the same suffered and always will suffer great physical pain and mental pain and anguish.

7. That immediately prior to being injured, as aforesaid, libelant was in good physical and mental condition and earning, or capable of earning, at his said occupation of able-bodied seaman, wages at the rate of approximately \$400.00 per month, but because of said injuries libelant has been unable to work or earn any money whatsoever since said 3rd day of January, 1945, and will be unable to work or earn any money whatsoever for a long period of time in the future and thereafter will be unable to work or [3] earn money except at great financial loss, but in this connection libelant alleges that he was paid the sum of \$266.67 in accordance with the general maritime law, which sum is equivalent to his base wages for the period from January 3, 1945, to March 23, 1945, the date when the voyage of said vessel for which libelant had been employed ended.

8. That by reason of the premises, libelant has been damaged in the sum of \$25,000.00, which amount libelant asks this Court to award him.

9. That more than sixty (60) days prior to the commencement of this suit, libelant presented his claims herein, in writing and in accordance with law, to respondent and to its agents, War Shipping Administration and Shepard Steamship Company, but said respondent and its said agents have failed to notify the libelant in writing or otherwise of a determination upon such claims, and therefore said claims are presumed to have been administratively disallowed and libelant is entitled to enforce his claims by this court action.

10. That all and singular the premises are true

and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

And for a Second Cause of Libel, Libelant Alleges as Follows:

1. Libelant re-alleges each and every allegation contained in the introductory part of the foregoing cause of libel and each and every allegation contained in paragraphs numbered 1 to 5, both inclusive, 9 and 10 of said foregoing first cause of libel.

2. That on or about the 3rd day of January, 1945, while libelant was working in the course of his said employment as an ablebodied seaman and carrying a garbage can on the main deck of said vessel, his right leg and ankle became caught and crushed [4] between a large, heavy crate and said garbage can, whereby libelant was made weak, sick, sore, lame, and disabled, and caused to suffer contusions, bruises, and lacerations of his right leg, a compound fracture of his right tibia and right ankle, punctured arteries of said leg, and damage to the nerves of said leg and ankle, and great nervous shock.

3. That because of said injuries, libelant has been unable to work or earn any money since said 3rd day of January, 1945, has been an outpatient at the San Francisco Marine Hospital ever since the 23rd day of May, 1945, and for necessary care and medical treatment of said injuries has been compelled to maintain himself from said 23rd day of May, 1945, until the present time, and as libelant is informed and believes and therefore alleges, he will be unable to work or earn money for a period of

180 days in the future, and during said 180 days libelant will be necessarily compelled to maintain himself for necessary care and medical treatment of said injuries; that said care and medical treatment has been and will be, during all of said periods, of benefit to said injuries of libelant; that said periods are reasonable periods for the allowance of maintenance to libelant; that under the general maritime law, libelant is entitled to and claims maintenance at the reasonable rate of \$5.00 per day from said 23rd day of May, 1945, to the present date and for said period of 180 days in the future; that by reason of the premises libelant is entitled to and claims maintenance in the reasonable sum of \$2,375.00, no part of which has been paid except the sum of \$581.25, and the balance, to wit, the sum of \$1,793.75, is due, owing, and unpaid by respondent to libelant, and libelant asks this Court to award him said sum of \$1,793.75.

Wherefore, libelant prays that a citation in due form of law, according to the courses of this Honorable Court in causes [5] of admiralty and maritime jurisdiction, may issue against respondent, citing it to appear and answer on oath all and singular the matters as aforesaid, and that this Honorable Court may be pleased to decree to the libelant the sums asked for by the libelant in the aforesaid libel, and for costs and for such other and further relief as in law and justice libelant is entitled to receive.

/s/ ALBERT MICHELSON,
Proctor for Libelant. [6]

State of California,
City and County of San Francisco—ss.

Theodore F. Bovich, being first duly sworn, deposes and says:

That he is the libelant above named; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated upon his information or belief, and as to those matters he believes it to be true.

THEODORE F. BOVICH.

Subscribed and sworn to before me this 16th day of March, 1946.

[Seal] /s/ LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Mar. 18, 1946. [7]

[Title of District Court and Cause.]

ANSWER OF RESPONDENT UNITED
STATES OF AMERICA

Comes now respondent, United States of America, a nation, and answering the libel herein alleges as follows:

As to the First Cause of Action:

I.

Answering the allegations of Article I, respond-

ent has no information or belief upon the subject, and demands strict proof thereof.

II.

Admits the allegations of Article II.

III.

Admits the allegations of Article III. [8]

IV.

Admits the allegations of Article IV.

V.

Admits the allegations of Article V.

VI.

Answering the allegations of Article VI, respondent alleges that on or about January 3, 1945, United States Army stevedores were loading heavy crates on the main deck of the SS "Charles J. Golden," and that neither said respondent, nor its agents, servants, or employees, had any supervision or control over the loading of said crates; and further answering the allegations of Article VI, respondent alleges that libelant was ordered to carry a garbage can along the said deck of the vessel, to a garbage scow, which was moored along the side of the said vessel, and save and except as hereinabove admitted and alleged, denies the allegations of Article VI.

VII.

Answering the allegations of Article VII, respondent alleges that at the time of the injury to said libelant, said libelant was earning a wage of \$100.00 per month, and respondent alleges that libelant has been paid all of his unearned wages up to the date of March 23, 1945, the date of the termination of said voyage; and further answering the allegations of Article VII, respondent alleges that libelant has been paid all his earned wages, and save and except as hereinabove admitted and alleged, denies the allegations of Article VII.

VIII.

Denies the allegations of Article VIII. Specifically denies that libelant has been damaged in the sum of \$25,000.00, or any other sum or sums, or otherwise.

IX.

Admits the allegations of Article IX. [9]

X.

Answering the allegations of Article X, respondent leaves open all questions of jurisdiction to the above-entitled Court.

As and for a Second, Separate and Distinct Answer and Defense to the First Cause of Action herein, respondent is informed and therefore alleges upon information and belief, that none of the injuries or damages sustained by said libelant, were caused or contributed to by any negligence or care-

lessness of said respondent, or any of its agents, servants or employees, and at the time said libelant received his injury, the said loading and stevedoring work on board the said vessel was under the supervision of the United States Army, and not this respondent.

As to the Second Cause of Action:

I.

Answering the allegations of Article I, respondent refers to its answer to Articles I, II, III, IV, V, IX and X, of the said First Cause of Action, and incorporates the same herein, by reference thereto, as if the same were set forth herein in full.

II.

Answering the allegations of Article II, respondent alleges that on or about January 3, 1945, said libelant received an injury, the extent of which is presently unknown to this respondent, and save and except as hereinabove admitted and alleged, denies the allegations of Article II.

III.

Answering the allegations of Article III, respondent has no information or belief as to the length of time during which said libelant will be disabled, or unable to work, and respondent prays that when said Court determines the said period of time for which libelant will, of necessity, be unemployed, due to said injury, that the said Court allow the said libelant maintenance money at the rate of

\$3.50 per day. Respondent further alleges that any [10] and all medical care necessary to effect a cure of libelant's injuries can be obtained by libelant, free of charge, at the United States Marine Hospital, and save and except as hereinabove admitted and alleged, denies the allegations of Article III.

Wherefore, respondent prays that libelant take nothing against said respondent, except as set forth herein in said answer, and respondent have its costs of suit.

/s/ FRANK J. HENNESSY, R
United States Attorney.
JOHN H. BLACK,
EDW. R. KAY,
Proctors of Counsel for
United States of America.

[Endorsed]: Filed June 6, 1946. [11]

[Title of District Court and Cause.]

OPINION

St. Sure, District Judge

This is a libel in personam basically under the Jones Act (41 Stat. 1007, 46 USCA §688) brought against the United [12] States pursuant to the privilege granted by §1 of the Suits in Admiralty Act (46 USCA §741), and Public Law 17 (Act Mar. 24, 1943, c.26, 57 Stat. 45; 50 USCA §1291). The libel is stated in two causes of action; one for damages and the other for maintenance and cure.

Allegations pertinent to decision on the first, in substance, are: Libelant's employment by the United States through the War Shipping Board, as a seaman on the SS Charles J. Colden: his injury in course of his employment while the vessel was lying in navigable waters and being loaded; negligence of respondent in failing "to have a licensed or other officer overseeing or supervising" the loading; negligence of a boatswain in ordering libelant "to carry a garbage can on said main deck between large heavy crates thereon, although there was no clear, open or safe passageway through which libelant could [execute the order] without danger of being injured"; negligence of respondent in failing to furnish libelant a safe place to work; and damages in the amount of \$2500.

Oral evidence was confined to testimony of libelant and one Kazem-Beck, to both of whom the order was directed. Aside from documentary evidence irrelevant to the only controverted issue, i. e., negligence, this was the only evidence before the Court. The testimony of the two witnesses is in complete harmony. It shows that on January 3, 1945, while the Charles J. Colden was moored portside to a dock at Oro Bay, New Guinea, "the Army" was loading large crates each containing either a tractor or a small tank on the starboard side of the vessel back of No. 4 hatch, by means of boom equipment on the portside. About 9 o'clock [13] a.m. the boatswain ordered libelant and Kazem-Beck to go aft of No. 4 hatch and move a number of empty garbage cans (of ordinary household size) forward

next to the deckhouse (amidship), which was a distance of 50 or more feet. At the time the order was given two crates had already been deposited by Army stevedores near No. 4 hatch. These crates stood about three feet apart and from 18 inches to two feet from the taffrail. Libelant and Kazem-Beck each picked up a garbage can, libelant following Kazem-Beck, who proceeded toward his destination via the space between the taffrail and the first crate. By reason of a starboard list and a slippery deck Kazem-Beck slipped, fell to the deck and his cans went overboard. Libelant then chose his course between the two crates and, for lack of space, instead of carrying his can he "backed up" and dragged it behind him. While so engaged a third crate weighing two tons, as it swung on the boom, hit one of the two stationary crates between which libelant was passing. The crate so struck moved and "jammed" libelant's leg between the garbage can and the other crate, resulting in the injury for which damages are sought. Cross examination revealed libelant's knowledge of the loading operation, as well as the fact, that the port deck was clear except for the boom equipment.

Parenthetically, it appears libelant received his wages for the remainder of the voyage and maintenance and cure to a given date.

The essence of libelant's grievance is negligence of the boatswain in allegedly ordering him to carry the cans "between" the crates. There is no evidence to support this alleged order. The order was in

effect to move the cans from one position to another, without specification of any route of travel. There was no negligence involved in that order; and the fact that loading of the crates by boom was in progress did not convert the innocuous order into an act of negligence. See *Crockett v. Brandt*, 2 Cir., 271 F. 415; *The Nacoochee* (D. C. Mass.) 275 F. 876. It is not too much to say that under the circumstances here shown, libelant failed to exercise ordinary prudence in choosing to pass between the crates while he knew other crates were being swung into position. Employment as a seaman does not relieve one so employed from the universal obligation to exercise ordinary care. On the contrary, a seaman assumes the risks incidental to his employment. (*The Cricket*, 9 Cir., 71 F. 2d 61, 63; *Roberts v. U. S. Fisheries*, 1 Cir., 141 F. 2d 288, 293.)

So far as the first cause of action is concerned, the libel must be dismissed for failure of libelant to sustain his burden of proof.

As to the second cause of action counsel for respondent at the trial, in effect, stipulated—at least counsel for libelant made no objection to the calculation—that libelant was entitled to maintenance at the rate of \$3.50 per day for approximately 270 days, a total of \$945.00. This is subject to correction as to the exact number of days. [15]

Decree will be entered dismissing the first cause of action, and in favor of libelant on the second cause of action.

Counsel may submit findings of fact and conclusions of law.

* * * * *

Dated: January 28, 1947.

[Endorsed]: Filed Jan. 30, 1947. [16]

[Title of District Court and Cause.]

ORDER

It Is Ordered:

1. That the first cause of action stated in the libel be dismissed;
2. That libelant recover of and from respondent the sum of \$945.00 as maintenance.

A. F. ST. SURE,

United States District Judge.

Dated: January 29, 1947.

[Endorsed]: Filed Jan. 30, 1947. [17]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled matter having come on regularly for trial on the 4th day of October, 1946, and evidence both oral and documentary having been adduced, the libelant being represented by Robert Reynolds, appearing for Albert Michelson, and J.

Hampton Hoge, appearing for John H. Black and Edward R. Kay, of counsel for United States of America, representing Frank J. Hennessy, United States Attorney for respondent, United States of America, and after due deliberation, the Court makes its

FINDINGS OF FACT

I.

That at all times herein mentioned the libelant was a resident of the County of Alameda, State of California, within this district.

II.

That respondent, United States of America, now is and was at all times mentioned herein a nation sovereign.

III.

That at all times herein mentioned the War Shipping Administration was and is an agency of the United States of America. [18]

IV.

That at all times herein mentioned the vessel, SS "Charles J. Colden", was and now is a merchant vessel of the United States owned and operated by the United States of America.

V.

That on or about the 3rd day of January, 1945, libelant was employed aboard said vessel by the

United States of America as an able-bodied seaman and that at said time the SS "Charles J. Colden" was afloat on navigable waters at Oro Bay, New Guinea; that libelant while so employed suffered an injury.

VI.

It is not true that on or about the 3rd day of January, 1945, or at any other time while respondent was engaged in loading said vessel, said respondent negligently or in any other manner failed to have any licensed or other officer overseeing or supervising sail loading of said vessel.

VII.

It is not true that on or about the 3rd day of January, 1945, or at any other time while respondent was engaged in loading said vessel, said bos'n of said vessel or any other officer or person ordered or negligently ordered libelant to carry a garbage can on said main deck between large, heavy crates thereon. It is not true that at said time there was no clear, open or safe passage on said deck through which libelant could carry said garbage can without danger of being injured.

VIII.

That no negligent order of any kind was given by said bos'n or any other person to said libelant; that with full knowledge on the part of libelant of the existence and availability of a safe, clear and unobstructed route and passageway through

which he should have and could have carried said garbage can, he deliberately and entirely at his own volition and selection chose [19] and used an obviously dangerous route and passageway in the carrying of said garbage can.

IX.

It is not true that on or about the 3rd day of January, 1945, or at any other time, respondent, while engaged in loading said vessel, negligently failed to have a clear, open and safe passageway for libelant to carry out any orders given him; it is not true that at said time and place respondent negligently failed to furnish libelant with a safe place to work. It is true that there was a clear, open and safe passageway for libelant's use as aforesaid. It is not true that at said time and place, in obedience to any negligent order, libelant was carrying said garbage can along the deck of said vessel between two crates, or that respondent negligently caused or permitted a large crate being loaded on said deck and being carried by ship's gear to negligently strike against another crate, thereby causing said last-mentioned crate to strike against and to crush or injure libelant. That any movement of said crates was a normal and reasonably to be expected consequence of proper and careful operation of ship's gear in such loading operations, all of which was and should have been known to libelant.

X.

It is true that libelant was not caused to suffer any injuries as the result of negligence of any kind of respondent.

XI.

It is true that libelant was negligent in carrying out his duties in that he failed to exercise ordinary prudence or care in passing between the crates on board the main deck of the vessel when he knew other crates were being swung into position on said main deck and that some shifting of crates was usual and to be reasonably expected. [20]

XII.

It is not true that libelant suffered or incurred general damages in the sum of \$25,000, or any other sum or sums or otherwise or at all.

XIII.

It is not true that libelant suffered, incurred or contracted personal injury or loss of wages or earnings due to any carelessness or negligence on the part of any agent, servant, officer or employee of the said vessel, SS "Charles J. Colden", or respondent, United States of America.

XIV.

It is true that as a result of certain injuries sustained by said libelant while in the employ of said vessel due solely to his own negligence, he

was on outpatient status at the San Francisco Marine Hospital from and after the 23rd day of May, 1945, to and including the 14th day of September, 1946, and is entitled to maintenance at the rate of \$3.50 per day for such period; it is also true that libelant has been paid maintenance at the rate of \$3.50 per day from the 23rd day of May, 1945, to and including the 18th day of December, 1945.

XV.

It is true that libelant is entitled to maintenance at the rate of \$3.50 per day from the 18th day of December, 1945, to and including the 14th day of September, 1946.

XVI.

It is true that libelant is entitled to the sum of \$945.00 as and for maintenance at \$3.50 per day for 270 days.

XVII.

All and singular, the premises herein are within the Admiralty and Maritime jurisdiction of the United States of America and of this Court. [21]

From the above Findings of Fact, the Court makes its

CONCLUSIONS OF LAW

I.

That libelant is not entitled to recover from respondent, United States of America, any sums for damages for personal injuries incurred by said libelant aboard the SS "Charles J. Colden".

II.

That libelant has failed to sustain the burden of proof of the allegations contained in the first cause of libel.

III.

That the First Cause of Action in said libel should be dismissed.

IV.

That libelant is entitled to recover from respondent the sum of \$945.00 as and for maintenance.

It Is Therefore Ordered that a decree be entered in favor of respondent, United States of America, as to the First Cause of Action, and the said First Cause of Action in the said libel be dismissed and that the said libelant recover from respondent the sum of \$945.00 on his Second Cause of Action as and for maintenance in accordance with the foregoing findings, without costs to either party.

Dated: March 11, 1947.

/s/ A. F. ST. SURE,

Judge of the United States
District Court.

[Endorsed]: Filed Mar. 12, 1947. [22]

In the District Court of the United States
for the Northern District of California,
Southern Division

No. 24,525-S

THEODORE F. BOVICH,

Libelant,

vs.

UNITED STATES OF AMERICA,

a nation,

Respondent.

FINAL DECREE

The above cause having come on regularly to be heard on the pleadings and proofs and having been submitted by the advocates for the respective parties, and after due deliberations having been had and after Findings of Fact and Conclusions of Law having been duly settled and signed;

It Is Ordered, Adjudged and Decreed that libelant take nothing from respondents on his first cause of action, and that the first cause of action be dismissed.

It Is Further Ordered, Adjudged and Decreed that libelant recover from respondents the sum of \$945.00 on the second cause of action, together with interest at the rate of 4% per annum until paid. Each party shall bear its own costs.

Dated: March 11, 1947.

Entered in Vol. 37 Judg. and Decrees at Page 752.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Mar. 12, 1947. [23]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

The libelant, Theodore F. Bovich, deeming himself aggrieved by that part of the order and decree made and entered in the above entitled cause wherein and whereby the first cause of action in the libel was dismissed, hereby appeals from said part of said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and petitioner respectfully prays that this appeal may be allowed, that a citation be issued directed to the above named respondent, United States of America, as provided by law, and that a transcript of record and proceedings upon which said decree was based, be duly authenticated and sent to the Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, April 24, 1947.

THEODORE F. BOVICH,

By ALBERT MICHELSON,

His Proctor. [24]

Receipt of a copy of the above Petition for Allowance of Appeal is hereby acknowledged this 29th day of April, 1947.

/s/ FRANK J. HENNESSY, TS

United States Attorney,
Proctor for Respondent.

/s/ JOHN H. BLACK,

/s/ EDWARD R. KAY,

Proctors of Counsel for
Respondent.

[Endorsed]: Filed Apr. 26, 1947. [25]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The Petition of the libelant in the above entitled cause for the allowance of the appeal to the United States Circuit Court of Appeals for the Ninth Circuit is hereby allowed.

It Is Further Ordered that a copy of this allowance of appeal, certified by the Clerk to be such, may be served upon the Proctors for respondent in lieu of personal service.

Dated, San Francisco, April 28th, 1947.

/s/ MICHAEL J. ROCHE,

District Judge.

Receipt of a certified copy of the foregoing Order allowing appeal is hereby acknowledged this 29th day of April, 1947.

/s/ FRANK J. HENNESSY, TS
United States Attorney,
Proctor for Respondent.

/s/ JOHN H. BLACK,
/s/ EDWARD R. KAY,
Proctors of Counsel for
Respondent.

[Endorsed]: Filed Apr. 28, 1947. [26]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

In connection with his petition for appeal, the libelant hereby assigns the following error in the order and decree of this court entered herein.

(1)

The court erred in dismissing the first cause of action in the libel.

(2)

The court erred in decreeing that libelant take nothing by his first cause of action.

(3)

The court erred in finding that it is not true that on or about the 3rd day of January, 1945, or at any

other time while respondent was engaged in loading the vessel SS "Charles J. Golden," said respondent negligently or in any other manner [27] failed to have any licensed or other officer overseeing or supervising said loading of said vessel.

(4)

The court erred in finding that it is not true that on or about the 3rd day of January, 1945, or at any other time while respondent was engaged in loading said vessel, said bos'n negligently ordered libelant to carry a garbage can on said main deck between large, heavy crates thereon, and that it is not true that at said time there was no clear, open or safe passage on said deck through which libelant could carry said garbage can without danger of being injured.

(5)

The court erred in finding that no negligent order of any kind was given by said bos'n or any other person to said libelant; that with full knowledge on the part of libelant of the existence and availability of a safe, clear and unobstructed route and passageway through which he should have and could have carried said garbage can, he deliberately and entirely at his own volition and selection chose and used an obviously dangerous route and passageway in the carrying of said garbage can.

(6)

The court erred in finding that it is not true that

on or about the 3rd day of January, 1945, or at any other time, respondent, while engaged in loading said vessel, negligently failed to have a clear, open and safe passageway for libelant to carry out any orders given him; and that it is not true that at said time and place, in obedience to any negligent order, libelant was carrying said garbage can along the deck of said vessel between two crates, or that respondent negligently caused or permitted a large crate being loaded on said deck and being carried by ship's gear to negligently strike [28] against another crate, thereby causing said last-mentioned crate to strike against and to crush or injure libelant. And the court erred in finding that it is true that there was a clear, open and safe passageway for libelant's use as aforesaid, and that any movement of said crates was a normal and reasonably to be expected consequence of proper and careful operation of ship's gear in such loading operations, all of which was and should have been known to libelant.

(7)

The court erred in finding that libelant was not caused to suffer any injuries as the result of negligence of any kind of respondent.

(8)

The court erred in finding that it is true that libelant was negligent in carrying out his duties in that he failed to exercise ordinary prudence or care in passing between the crates on board the main

deck of the vessel when he knew other crates were being swung into position on said main deck and that some shifting of crates was usual and to be reasonably expected.

(9)

The court erred in finding that it is not true that libelant suffered or incurred general damages in the sum of \$25,000, or any other sum or sums or otherwise or at all.

(10)

The court erred in finding that it is not true that libelant suffered, incurred or contracted personal injury or loss of wages or earnings due to any carelessness or negligence on the part of any agent, servant, officer or employee of the said vessel, SS "Charles J. Golden," or respondent, United States of America.

(11)

The court erred in finding that injuries sustained by [29] libelant while in the employ of said vessel were due solely to his own negligence.

(12)

The court erred in failing to find and hold that libelant was entitled to recover damages for personal injuries sustained by libelant aboard the SS "Charles J. Golden."

(13)

The court erred in failing to find and hold that

libelant had sustained the burden of proof of the allegations contained in the first cause of libel.

(14)

The court erred in finding and holding that libelant was entitled to recover on his second cause of action only.

Dated, San Francisco, April 26, 1947.

ALBERT MICHELSON,
Proctor for Libelant.

Receipt of a copy of the above Assignment of Errors is hereby acknowledged this 29th day of April, 1947.

/s/ FRANK J. HENNESSY T. S.
United States Attorney,
Proctor for Respondent.

/s/ JOHN H. BLACK,
/s/ EDWARD R. KAY,
Proctors of Counsel for
Respondent.

[Endorsed]: Filed Apr. 26, 1947. [30]

[Title of District Court and Cause.)

PRAECIPE FOR APOSTLES ON APPEAL

To the Clerk of the above-entitled Court:

You will please make up, certify, and file a transcript of the record in the above-entitled cause upon the appeal thereof to the Circuit Court of Appeals

for the Ninth Circuit, and incorporate therein the following:

1. The libel.
2. The answer of respondent.
3. The reporter's transcript.
4. The opinion of St. Sure, District Judge, filed January 30, 1947.
5. The order filed January 30, 1947.
6. The findings of fact and conclusions of law.
7. The final decree. [31]
8. Petition for allowance of appeal.
9. Order allowing appeal.
10. Citation and admission of service.
11. Assignment of errors.
12. Clerk's certificate to transcript of record.
13. Apostles on Appeal.

Dated, San Francisco, April 26, 1947.

ALBERT MICHELSON,
Proctor for Libelant.

Received copy of the within Apostles on Appeal
this 29th day of April, 1947.

/s/ FRANK J. HENNESSY, T. S.
United States Attorney,
Proctor for Respondent.

/s/ JOHN H. BLACK,
/s/ EDWARD R. KAY,
Proctors of Counsel for
Respondent.

[Endorsed]: Filed Apr. 26, 1947. [32]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 32 pages, numbered from 1 to 32, inclusive, contain a full, true, and correct transcript of the records and proceedings in the libel of Theodore F. Bovich vs. United States of America, No. 24525 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.20 and that said sum has not been paid by the attorney for appellant and that appellant is a seaman proceeding under 28 USCA, Sec. 837, without prepayment of costs. I further certify that the annexed is the original Citation & Admission of Service.

In Witness Whereof, I have hereunto set my hand and affixed the seal of service of said District Court at San Francisco, California, this 6th day of May, A.D. 1947.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ E. H. NORMAN,
Deputy Clerk. [33]

In the District Court of the United States, for the
Northern District of California, Southern Division

Before: Honorable A. F. St. Sure, Judge.

No. 24,525-S

THEODORE F. BOVICH,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Friday, October 4, 1946, 10:00 A.M.

Appearances:

Robert Reynolds, Esq., for the Libelant.

J. Hampton Hoge, Esq., and Henry Schaldach,
Esq., for the Respondent.

The Clerk: Bovich versus The United States,
for trial.

May I state for the record that Mr. Robert Reynolds appears on behalf of the Libelant, and Mr. J. Hampton Hoge and Mr. Henry Schaldach for the Respondent.

Mr. Reynolds: If it please the Court, this is a Seaman's action arising out of an injury incurred on the Charles J. Colden on the 3rd day of January, 1945. Mr. Bovich signed on the ship here in San Francisco about the 11th day of October, 1944, and then made a trip to New Guinea.

The Court: Made what?

Mr. Reynolds: Made a trip to New Guinea on the ship.

The ship was in Oro Bay. On the 3rd day of January, 1945, in loading operations, when this accident occurred, Mr. Bovich was an able-bodied seaman aboard the ship; he had been ordered by the boatswain, with another able-bodied seaman named Kazem-Beck to go to the aft part of the ship and move some garbage cans. He was engaged in this activity and moving these cans between two large crates that were placed on top of a deck load of lumber, when one of the crates was bumped by another in loading operations. He was caught between the crate and the ash can he was moving. He sustained a compound comminuted fracture of his right tibia just above the ankle. He was taken to the hospital in New Guinea and remained there for four or five months before he was returned to the United States and checked in in San Francisco at the Marine Hospital on the 23rd [2*] day of May, 1945. From the 23rd day of May, 1945, until the 6th day of March, 1946, he was an out-patient at the Marine Hospital.

The Court: Here in San Francisco?

Mr. Reynolds: In San Francisco, yes, Your Honor.

The negligence is based upon the fact that he was not furnished a safe place to work, and upon the negligent order of the boatswain.

We will call Mr. Kazen-Beck?

*Page numbering appearing at top of page of original Reporter's Transcript.

The Court: Do you wish to make a statement, Mr. Hoge?

Mr. Hoge: No, your Honor.

The Court: Well, what is the defense? I suppose the defense is there was no negligence?

Mr. Hoge: No, we are representing the United States here, and we believe this thing was due to the negligence of the Army that was handling these operations at the time.

The Court: Of the Army?

Mr. Hoge: Yes.

The Court: Well, the Army of what, the United States?

Mr. Hoge: The United States Army.

The Court: Yes.

Mr. Hoge: Well, the question arises again whether or not there was any liability upon the part of the United States for the negligence of an enlisted man in the Army. That matter came before your Honor some time back, as I recall it. [3]

The Court: Has this same question been before me before?

Mr. Hoge: Yes, it has, but your Honor decided the case on another point, on a jurisdictional question.

The Court: Let's make clear this issue. The charge is there was negligence, and negligence on board a boat that was being operated by the United States of America. Is that right?

Mr. Hoge: The War Shipping Administration.

The Court: Well, what is it? The suit is against the United States of America, respondent. The War

Shipping Administration, of course, is an agency of the Government, of the United States.

Mr. Hoge: Yes.

The Court: There can be no question about that.

Mr. Hoge: No, your Honor.

The Court: Just what is the issue here for me to try? The suit is for negligence, for personal injuries, charging negligence on a boat operated by an agency of the United States. The suit is against the United States of America. Just, then, what is the issue?

Mr. Reynolds: Well, if it please the Court, I think the evidence will show the Army was handling the winches and doing the stevedore work, loading the cargo aboard this ship. However, the charge of negligence upon which the libelant relies, is the fact that he was not furnished a safe place to [4] work and was negligently ordered to work in this position of danger. It would be a proposition where concurrent negligence was involved, assuming the evidence shows that the Army stevedores were negligent and did contribute to the accident.

The Court: Well, is there anything peculiar or unusual about the issue that will be submitted to the Court?

Mr. Reynolds: No, I don't believe so.

Mr. Hoge: No, your Honor.

The Court: Then the issue is as to whether or not the United States of America, or its agents, are guilty of negligence. Is that right?

Mr. Reynolds: Yes, your Honor.

The Court: Is that right?

Mr. Hoge: Yes, your Honor.

Mr. Reynolds: And the charge of negligence is based upon the failure to furnish——

The Court: A safe place to work.

Mr. Reynolds: A safe place to work, and the negligent order of the boatswain.

The Court: What boat?

Mr. Reynolds: The boatswain.

The Court: Of the boatswain?

Mr. Reynolds: Yes, your Honor.

The Court: All right. Go ahead. [5]

ALEXANDER N. M. KAZEM-BECK

called as a witness for the Libelant, sworn:

The Clerk: Will you state your name to the Court.

A. Alexander N. M. Kazem-Beck.

Direct-Examination

By Mr. Reynolds:

Q. Mr. Kazem-Beck, will you state your residence to the Court?

A. My residence, sir?

Q. Yes.

A. 529 - 8th Avenue, San Francisco, 18.

Q. How long have you lived at that address?

A. Three years next month.

Q. Are you a seaman by trade?

A. I am, sir.

(Testimony of Alexander N. M. Kazem-Beck.)

Q. How long have you been going to sea?

A. Three and one-half years.

Q. At the present time are you still in the Merchant Marine? A. Yes, sir.

The Court: You said you live in San Francisco and have been living here three years?

A. Three years at this address. My own home. Three years ago I bought this house.

Q. (By Mr. Reynolds): You have been going to sea three and one-half years? A. Yes, sir.

Q. And are still a member of the Merchant Marine? A. I am, sir. [6]

Q. Do you hold a license?

A. Second Mate, Second Officer.

Q. What was the last ship you were on?

A. The Robert C. Grier.

Q. Were you sailing as second mate on that ship? A. Yes, sir.

Q. When did you get off?

A. Yesterday morning, sir.

Q. Were you a member of the crew of the Charles J. Colden in January, 1945?

A. Yes, sir.

Q. In what capacity were you serving at that time? A. Able-bodied seaman.

Q. Do you recall the approximate date when you signed on that ship?

A. Yes, it was October 11, 1944.

Q. After you left San Francisco on the Charles J. Colden, just where did you go?

A. We went to New Guinea, from there we went

(Testimony of Alexander N. M. Kazem-Beck.)

to the Philippine Islands, back to New Guinea, and to the States.

Q. Do you recall an accident that occurred to an able-bodied seaman by the name of Bovich aboard that ship? A. Yes, I do.

Q. Where was the ship at that time?

A. Oro Bay, New Guinea.

Q. Do you recall about how long you had been in Oro Bay at the time of the accident?

The Court: What Bay was that?

A. Oro Bay, O-r-o. No, I do not recall just how many days we laid there before the accident happened, but it has been a few days.

Q. (By Mr. Reynolds): At the time this accident occurred [7] were you anchored out in the stream, or moored to a dock?

A. Moored to a dock.

Q. What side to was the ship?

A. Port side to.

Q. Were any loading and unloading operations going on at that time?

A. There was loading operations of loading big crates containing either tractors, caterpillar tractors, or small tanks, one of the two. We were loading them from the dock which was on the port side of the ship, back of No. 3 Hatch.

Q. Do you know——

A. No. 4 hatch. I am sorry, my mistake.

Q. Do you know a seaman by the name of Theodore Bovich? A. Yes, I do.

(Testimony of Alexander N. M. Kazem-Beck.)

Q. Were you working with him at the time he was injured, on the 3rd day of January, 1945?

A. Yes. He and I got orders to move some garbage cans.

Q. Can you tell the approximate time of day the accident occurred?

A. Roughly, around 9:00 in the morning. I gave a detailed report about the accident to the Captain of our ship.

The Court: We will have a recess of five minutes and suppress the noise of some of the janitors.

(Recess.)

(Question and answer read by the Reporter.)

The Witness: I have given a detailed report, a written report to the Captain of the ship, Mr. Fletcher, Captain Fletcher. [8]

Q. (By Mr. Reynolds): Where were you working at the time you were given this order?

A. Up in No. 4 Hatch. At the time I was given the order?

Q. Yes. A. I was working forward.

Q. That would be forward the midships house?

A. Yes, that is right, forward of the midships house.

Q. Who was working with you at the time?

A. Mr. Bovich was.

Q. Who gave the order?

A. The boatswain.

Q. What was the order?

A. The order was to go back aft to No. 4 Hatch

(Testimony of Alexander N. M. Kazem-Beck.)

and move a number of cans, approximately 12 of them, empty garbage cans, to move them forward next to the deck house.

Q. Did you comply with the order immediately?

A. Immediately, sir, yes, sir.

Q. Did the boatswain go to the aft part of the ship with you? A. No, he did not.

Q. Were any of the mates present when you started to do this work? A. No, sir.

Q. Were any loading operations going on at this time? A. Yes, indeed.

The Court: Were you alone?

A. Bovich and I, the two of us.

Q. You and Bovich moved forward to move the cans? A. Moved aft, from forward.

Q. To move the cans?

A. To move the cans, yes, sir. [9]

The Court: All right.

Q. (By Mr. Reynolds): You say there were loading operations being conducted when you got back there? A. Yes, at No. 4 Hatch.

Q. Just describe what occurred from there on?

A. Well, they put on a couple of big crates.

The Court: "They"—who?

A. The Army.

Q. They put them in, or they were there?

A. Sir?

Q. You say they put in a couple of big crates.

A. That is right, the Army stevedores placed a couple of big crates containing these caterpillar tractors, or something of that sort.

(Testimony of Alexander N. M. Kazem-Beck.)

Q. Let's be specific about this. Did they put them in after you got there, or were they there when you got there?

A. What I mean to say, the moment we got back to No. 4 Hatch, there were two crates already standing on the starboard side of No. 4 Hatch.

The Court: Mr. Reynolds, conduct the examination.

Mr. Reynolds: Yes.

The Court: It appears that when he got back there, there were two crates.

Mr. Reynolds: Yes, your Honor.

The Court: That had already been placed there. Is that right? [10]

A. That is right, sir.

The Court: Go ahead.

Q. (Mr. Reynolds): What was the approximate size of those crates?

A. I would say they were about 12 feet long by 7 feet high, by about 8 feet wide, each.

The Court: What are these crates?

A. What?

Q. Where did you come from?

A. I came from Russia, sir, originally.

Q. What do you mean when you speak of a crate? A. I mean a box.

Q. A box?

A. That is right, a box containing either a tractor—I have no way of knowing just what is inside—either a tractor or a tank, or something of that sort.

(Testimony of Alexander N. M. Kazem-Beck.)

Q. You are speaking of crates?

A. That is right.

Q. Was there more than one?

A. There were two of them, sir.

Q. Were they wooden?

A. Yes, the containers were wooden, the boxes were wooden.

Q. And were they wooden boxes?

A. Wooden boxes, yes, sir.

Q. You know what a wooden box is?

A. Yes, I do.

Q. In America, and I suppose in Russia too, you have seen these crates, in England and other countries, that contain what they call "litter"?

A. No, I have not, sir. [11]

Q. At any rate, when you say this was a crate, it was a box? A. That is right.

A. A wooden box? A. That is right, sir.

Q. Boarded up all the way on three sides?

A. That is correct, sir.

The Court: Go ahead.

Q. (Mr. Reynolds): Just where were these two boxes located, Mr. Kazem-Beck?

A. They were located on the starboard side of the ship, about between a foot and a half and two feet from the taffrail or top of the bulwark, and were about three feet from each other.

The Court: Is that important?

Mr. Reynolds: Yes, it is, your Honor.

The Court: All right. Go ahead.

A. They were about three feet apart, and the

(Testimony of Alexander N. M. Kazem-Beck.)

only two possible ways we could carry our empty garbage cans would be either, follow the outside passage—in other words, to move them, stepping on the slippery taffrail or between the two crates, or the two boxes, sir.

Q. Was it necessary to pass by these two boxes in order to place the cans where you were ordered to place them?

A. I tried to carry the first garbage can——

The Court: Answer the question.

A. It was.

Q. Now, what about the cans? What is the size of these cans? [12]

A. Probably about three feet high by two and one-half feet wide.

Q. Metal containers? A. Yes, sir.

Q. Such as we know as garbage cans?

A. Regular garbage cans in use on shore.

Q. In America. A. Yes, sir.

Q. You don't know what they were made of, the ordinary circular——

A. Ordinary circular garbage cans.

Q. Garbage cans.

A. Used in every home.

Q. Used in every home, well, they were a good size, weren't they? A. They were, sir.

Q. About how high were they?

A. I would say three feet, perhaps three and one-half feet by about two and one-half feet wide, round.

Q. Yes, and were they filled with garbage?

(Testimony of Alexander N. M. Kazem-Beck.)

A. No, we dumped the garbage previously. In the morning the garbage scow came alongside and we dumped the garbage. We got orders to move these cans right forward of the deck house.

Q. You got orders to move what you might call the garbage cans, where?

A. Right next the deck house, the starboard side.

Q. From where?

A. From where they were, just aft of No. 4 Hatch.

Q. How many feet were you required to move them, about?

A. I would say approximately 50 feet, 60 feet, perhaps. [13]

Q. That is, after they had been emptied?

A. Correct, sir.

The Court: Go ahead.

Q. (Mr. Reynolds): Was there any way you could carry these cans other than through this narrow passageway?

A. There was one possible way to carry them, which was on the outside, about a two or two and one-half foot space between the taffrail and the first box. I tried to do it, but the ship had a starboard list, the taffrail was slippery because of the garbage that had been dumped over. When I tried to, I slipped and fell, the garbage can fell overboard, and I had a bad bruise on the inside of my left thigh.

The Court: Caused by this?

(Testimony of Alexander N. M. Kazem-Beck.)

A. That is right, trying to carry it on the outside, because there was nothing to hold on to.

Q. You mean lift?

A. I was trying to balance myself.

Q. Were you asked to lift these cans?

A. I had to lift it in order to carry it, sir.

Q. I know, but could you not shove them along the deck?

A. Well, if you shoved it, it would amount to the same thing. There was not enough space, of course, to stand, because there was only about a two-foot space between the wooden box and the taffrail, which is the top of the bulwark, so I slipped and fell. The first garbage can went overboard.

Q. Wasn't there room enough on deck to push the can through?

A. No, there was not. [14]

Q. You had to lift it? A. That is right.

Q. You dumped it first before you lifted it?

A. They were all dumped. They were empty cans.

Q. What caused the trouble?

A. Well, the trouble was caused by the fact that there were only two possible ways of carrying these garbage cans, either the way I tried first, which was not successful because I slipped and fell, and the second way was the way Mr. Bovich tried, between the two boxes. There was about a three-foot space in between. So, he was dragging an empty garbage can behind him. He was dragging it, and as he was doing that——

(Testimony of Alexander N. M. Kazem-Beck.)

Mr. Hoge: Could I interrupt? Was the witness looking at the man doing this, or is that something he was told?

The Court: Did you see this?

A. You mean when Mr. Bovich was hit?

Q. Did you see what you are now describing?

A. I did see that. Yes, I did.

The Court: Go ahead.

A. I saw Mr. Bovich start to drag the can. He was backing up, dragging this garbage can behind him, and what happened is this, that he went through where the Army stevedores, when they were placing the next big wooden box with what we call heavy winches, approximately two tons, they hit the adjacent box, the adjacent box moved, and jammed his leg against the garbage can, which, in turn, was jammed against the next [15] box and crushed his leg.

Q. (Mr. Reynolds): Did you see Mr. Bovich while in this position jammed between the crate and the can?

A. I saw him in the position when he started this, but I did not see the actual moment of—

The Court: Impact?

A. Impact. I did not see that, sir.

Q. (Mr. Reynolds): How was your attention attracted to his predicament?

A. Because I heard shouts. My first impression was that the colored stevedores used to fool and play a lot, singing and joking, I did not pay atten-

(Testimony of Alexander N. M. Kazem-Beck.)

tion. All of a sudden it dawned on me that it was Mr. Bovich's voice.

The Court: What?

A. That it was Mr. Bovich's voice. Someone was in distress.

Q. His what? A. His voice.

Q. His voice? A. I recognized his voice.

Q. What did you hear?

A. I heard shouts. No words, just shouts, shouts of pain, just "Ah, Ah, Ah". It is impossible for me to describe.

Q. I know.

A. At the time I had my left trouser leg rolled up looking at the bruise of mine which I sustained trying to bring the first garbage can on the outside, where I fell. I was swearing and cussing. I had my trouser leg up looking at the bruise. All of a sudden I heard the shouts, [16] so I turned around and saw Mr. Bovich jammed between these two wooden boxes. So, the first thing I did, I tried to think of a crowbar, a peevy as the stevedores call it, to use as a lever to lift the box to extricate Bovich from that position.

Q. You saw him?

A. I saw him right there, immediately after it happened.

Q. You saw him jammed?

A. I saw him jammed and what is more, this box was standing on his toes, and it is two tons, a two-ton box.

Q. What was that box?

(Testimony of Alexander N. M. Kazem-Beck.)

A. It has either a tractor or a small tank, one of the two. It weighed two tons, had to be lifted by what we call the jumbo boom.

Q. How could that get on his foot?

A. When the next box was being loaded, it struck this one. This box is on what we call a one by four, a strip of wood nailed underneath so the stevedores can slip a sling under it when lifting it. Evidently it jumped a little and was placed right on his foot, that besides crushing his leg. So, I ran and got what we call a stanchion, which is nothing but a bar which we use for the gangplank. I got this, it was about this round, probably an inch and a half in diameter, but as soon as I tried to lift it, I bent it to a 90 degree angle and could not begin to lift the thing because it was so heavy. Meantime, the Boatswain, Mr. Malone came on and sent to the stevedores, stopped their operations, put a sling around the box and lifted the box so [17] he could lift his leg.

Q. Get out?

A. Get out, yes, sir. He had a bad crush.

Q. How did the box get on his leg anyhow?

A. That is something I don't know, sir. As I said, there was about this much space between the box and the deck, because of the strip of wood. Evidently it just jumped a little bit when it was hit by the next wooden box. It must have jumped.

Q. This was in port?

A. In port, yes, sir.

Q. The ship was moving?

(Testimony of Alexander N. M. Kazem-Beck.)

A. The ship was moored to the dock on the port side, which is the left side.

Q. There is a movement, though, isn't there?

A. No, no movement at all, no, sir.

Q. Why had he got in that critical position?

A. Well, we had our orders. We had to carry out our orders, we had no alternative. We never questioned orders. The Chief Mate gave them to the Boatswain, and the Boatswain gave them to the two of us, knowing we will carry it out immediately, which we did. I tried where it seemed best, but it was not successful, I told you I fell. Mr. Bovich tried the other way, but it turned out to be even worse. There were only two possible ways of doing it, sir.

Q. Only two? A. Only two possible ways.

Q. You tried both?

A. I tried the first way, and he tried the second way.

Q. And they failed. A. Yes, sir. [18]

Q. What was wrong?

A. You ask my opinion, sir?

Q. Well, I am to decide the case, of course.

A. I mean, I cannot question my orders given me, sir. I just carry them out. But, if you are asking my opinion, there was no immediate need of moving the cans, in the first place. They had two cans standing by the steward's department on the port side. There was no need to move the cans, which was proven. After Mr. Bovich was hurt, the cans were left in the same position as they were until

(Testimony of Alexander N. M. Kazem-Beck.)

the loading operations were over. So, there was no immediate need. As a matter of fact, it was contrary to all the rules and regulations of the Merchant Marine.

Mr. Hoge: Your Honor, I have not objected to this. He is giving his conclusion and opinion, and arguing.

The Court: Of course, I inquired for it.

Mr. Hoge: I am not questioning your Honor.

The Court: No, no. I have no right to do it.

The Witness: I am sorry, sir, if I said something out of order, but you asked me, so I gave my opinion.

The Court: Yes. You are not to blame. I asked for it, and the objection of Counsel is proper, of course. Mr. Reynolds, of course, we are trying to get to the bottom of this.

Mr. Reynolds: Yes, your Honor.

The Court: We want the truth, and want to decide the case as near right as we can. [19]

Mr. Reynolds: I am perfectly in accord with that, your Honor.

Q. In other words, you were ordered to proceed aft and to move these garbage cans forward. Is that correct?

Mr. Hoge: That has been asked and answered.

A. Yes, sir.

The Court: Well, it won't hurt to review a little bit. Go ahead, go ahead.

A. That is right, sir.

Q. (Mr. Reynolds): And the Boatswain or the

(Testimony of Alexander N. M. Kazem-Beck.)

Mate did not come aft, or examine the situation as it existed? A. No, sir.

The Court: Where was this, was this in port?

Mr. Reynolds: Yes, your Honor.

The Court: Yes.

A. Oro Bay, New Guinea.

The Court: Well, have we had any testimony at all as to why it was necessary for all this movement of these cans, and so forth.

Mr. Reynolds: No, your Honor, because I think that would be a matter of defense. That is the contention.

The Court: All right. You don't have to say anything further. And the result of all this was that the Libelant was hurt. Was he hurt badly?

Mr. Reynolds: Yes, your Honor. [20]

The Court: Anything further?

Q. (Mr. Reynolds): Mr. Kazem-Beck, did you remain aboard the ship after this accident occurred?

A. Yes, sir, I did.

Q. And Mr. Bovich was immediately removed from the ship? A. Immediately, yes.

Q. Did he return to the ship before you sailed?

A. No, he did not.

Q. When did you sail?

A. We sailed a couple of days afterwards, sir.

Q. Was there any further cargo stored on the starboard side of the ship in the approximate place you had been working?

A. You mean after these two boxes were placed?

Q. Yes.

(Testimony of Alexander N. M. Kazem-Beck.)

A. A number of the same sized boxes.

Q. Were they placed forward or aft of the other two?

A. They were placed aft of the other two. None were placed forward. These two were the first ones.

The Court: What is the point of that?

Mr. Reynolds: Merely to show, your Honor, that these men were placed in an unsafe position. They actually were placing some crates and loading there at the time that the boatswain and the mate ordered them to work in that hazardous position.

The Court: Listen, you say there was something back of it. I don't see what that has to do with it. You mean [21] they were again placed in the hazardous position?

Mr. Reynolds: No, your Honor. They merely continued the loading operations, and loaded some crates in this area where Mr. Bovich was hurt, which indicated they were loading there at the time, but neither Mr. Bovich nor Mr. Kazem-Beck were warned of this.

The Court: This happened after the accident?

Mr. Reynolds: Yes, your Honor.

The Court: What has it got to do? How in any way does it relate to the accident?

Mr. Reynolds: Merely that there was a continuation of the operation, your Honor, that was being conducted at that time.

The Court: Of course the operations continue, you know, in loading a ship.

(Testimony of Alexander N. M. Kazem-Beck.)

Mr. Reynolds: Yes, your Honor.

The Court: So I cannot see any point to it, Mr. Reynolds, unless you make it clear to me. I cannot see it. Of course it is in evidence.

Mr. Reynolds: I won't pursue it.

The Court: You may if you wish to, if there is any point to it.

Q. (Mr. Reynolds): Mr. Kazem-Beck, was the garbage scow alongside the ship at the time the accident occurred?

A. It was not at that time. It was earlier in the morning, [22] not at the time it happened.

Q. Was anything moored alongside the starboard side of the ship?

A. Nothing at all, sir.

Mr. Reynolds: I think that is all.

The Court: Did they dump what you call garbage from the ship on to a garbage boat?

A. A garbage scow, yes, sir, earlier that morning, about 8:00 o'clock. The accident happened somewhere around 9:00. It happened three years ago. I gave a very detailed report to the Captain of our ship. It has been three years ago, so I cannot remember exactly, sir.

Q. You could not be expected to.

A. At the time, I gave a very detailed report to the Captain and the Shephard Line has the report. I gave a very detailed report.

Q. In writing? A. In writing.

The Court: I did not know that during a time of war they dumped garbage on a garbage scow.

(Testimony of Alexander N. M. Kazem-Beck.)

A. Yes, you are not allowed to dump it in the bay, for sanitary reasons.

Q. What bay?

A. Any kind of a bay, like we have in San Francisco.

Q. Of course. Where were you?

A. On my last trip, I got off Friday.

Q. Where were you then? A. Oro Bay.

Q. Where is Oro Bay? A. New Guinea.

Q. I did not know they had regulations there.

A. Oh, yes, indeed.

Q. (Mr. Reynolds): They had regular dock facilities there?

A. Regular dock, dock facilities, garbage scow that moved on out to sea and dumps it over a way out at sea.

Cross Examination

By Mr. Hoge:

Q. Mr. Kazem-Beck, on what side of the ship was it that you first started to carry these cans?

A. The starboard side of the ship, sir.

Q. On what side of the ship was Mr. Bovich when he had his accident?

A. The starboard side.

Q. Both were on the starboard side?

A. That is right.

Q. They had at that time five crates between the hatch and the bulwark, didn't they?

A. No, two.

Q. Did they have any crates over the hatch?

(Testimony of Alexander N. M. Kazem-Beck.)

A. Well, the second crate or box was about three feet, or thereabouts, over the hatch. The space between the taffrail bar and the hatch itself is about 18 feet. If the box was about eight feet, that leaves about three feet over the hatch.

Q. You knew the Army stevedores were loading that ship, didn't you?

A. Oh, yes, sir, I did know it.

Q. You knew they were bringing in these crates?

A. Yes, I did.

Q. On the port side of the ship it was absolutely clear? Nothing was between the hatch and the bulwark? [24]

A. Nothing except the stevedores loading the ship from the port side. It was absolutely clear, was it not? A. That is right.

Q. Now, these cans were relatively light, weren't they? They were galvanized iron cans?

A. Correct, light cans, yes, sir.

Q. You could take them in your hands and lift them up? A. Yes, you could.

Q. And when you were told to carry these cans forward, why, you were not told the way to carry them, what was to do it, what aisles to take?

A. No, we were not.

Q. You were just told to move the cans to some other part of the ship? A. Correct, sir.

Q. Now, it was not until after you heard the hollering, heard Mr. Bovich yell, that you looked to see the predicament he was in. Is that right?

A. That is correct.

(Testimony of Alexander N. M. Kazem-Beck.)

Q. And all these things you testified about, what he was doing and the position he was in, that is just something you have been told, is it not?

A. I did not quite get it?

Q. I say——

The Court: Read it.

(Question read by the Reporter.)

A. No, I actually saw him in this position after the accident happened. I actually saw him beginning to take these cans. I saw him doing this. [25]

Q. How far were you from him?

A. I would say about 20 feet.

Q. What is the distance from this hatch we are concerned with here, to the bulwark on the port side of the ship?

A. You mean the hatch itself? About 18 feet.

Q. What is the distance from the hatch to the bulwark?

A. I said about 18 feet, roughly speaking.

Q. That is on the port side of the ship?

A. Either the starboard or port. The distances are the same.

Mr. Hoge: I think that is all.

Redirect Examination

By Mr. Reynolds:

Q. Mr. Kazem-Beck, you were not told to follow any particular path in taking these cans up, as you testified?

Mr. Hoge: Objected to as leading and suggestive.

(Testimony of Alexander N. M. Kazem-Beck.)

A. No, sir, it was left to us.

Mr. Hoge: It has already been asked and answered.

The Court: I will allow it. Go ahead.

A. No, sir, it was left to us.

Q. (Mr. Reynolds): Why could you not go on the port side of the ship?

Mr. Hoge: Objected to as cross examining his own witness.

The Court: Well, it is, and it calls for a conclusion.

The Witness: May I answer this question? [26]

Mr. Reynolds: Your Honor, the contention is that there was only one passageway that could be used at this time. That was taken by Mr. Kazem-Beck and Mr. Bovich. Mr. Hoge brought out on cross examination an answer that there were no obstructions on the port side of the ship. I want to ask the witness what is the reason, or if there was any reason why the could not go on the port side of the ship.

Mr. Hoge: I think that is hitting below the belt, with a witness who is an intelligent witness sitting and listening to the statement he is making to your Honor, and practically placing the words in the witness' mouth.

The Court: I was wondering what the difficulty was about handling these cans. I heard the witness say he could pick them up, lift them over his head if he wanted to. There isn't any doubt about that, is there?

(Testimony of Alexander N. M. Kazem-Beck.)

The Witness: Except that there was no way of carrying them, because there was only about two feet, or two and a half feet, perhaps, between the box and the taffrail, and it was slippery, and the ship had a starboard list. In other words, you had to balance yourself with nothing to hold on to. When you have a can in your hand, you are just out of luck. That is what happened to me. The other way was between the two boxes. That is what Mr. Bovich did, with disastrous results.

Q. What happened to you? You were not hurt.

A. I was not hurt [27] badly. I was hurt some. I lost a can.

Q. What do you mean, you lost it overboard?

A. I lost it overboard. I fell myself. I had a bad bruise. It was not bad enough to amount to anything; it was a bruise.

Q. Could you not shove those cans along the deck?

A. No, sir. There was not enough space; just enough space to balance myself against the box; then you almost have to be an acrobat to do it. I tried it just for the fun. I did not want to take a chance, as Mr. Bovich did, with disastrous results. It goes against the first rudiments of seamanship.

Q. What is that?

A. An ordinary seaman knows, it tells in his booklet, when stevedores are loading or unloading he is not supposed to go under this thing, even nearby where anything can hit him or fall on him.

(Testimony of Alexander N. M. Kazem-Beck.)

Q. (Mr. Reynolds): What side of the ship were the loading operations being conducted on?

A. On the port side.

The Court: Just a minute. There is an objection of Mr. Hoge's here. The objection is overruled. You may have an exception.

The Witness: The port side.

Q. (Mr. Reynolds): In which were the booms connected?

A. They were connected aft of the port side.

Q. On what side of the ship was the dock?

A. The port side.

Mr. Reynolds: I think that is all. [28]

Mr. Hoge: No further questions, your Honor. Well, I might ask him this:

Recross-Examination

By Mr. Hoge:

Q. When you say the booms were on the port side, you mean the gear was over on that side?

A. That is right, sir.

Q. But the aisleway, as you testified, that 18-foot space, was clear, was it not?

A. The 18-foot space?

Q. Yes.

A. It was clear except for the two boxes standing on it.

Q. I mean the port side, not the starboard.

A. No boxes on the port side, no.

(Testimony of Alexander N. M. Kazem-Beck.)

Q. As you testified before, that was clear, wasn't it?

A. It was clear, yes.

Mr. Hoge: That is all.

(Witness excused.)

Mr. Reynolds: Call Mr. Bovich.

THEODORE F. BOVICH

the plaintiff, called in his own behalf, Sworn:

The Clerk: Will you state your full name to the Court, please?

A. Theodore Francis Bovich.

Q. B-o-v-i-c-h? A. That is right.

Direct-Examination

By Mr. Reynolds:

Q. What is your present address, Mr. [29] Bovich?

A. 22745 Victory Drive.

Q. What town? A. Hayward.

Q. How long have you resided there?

A. Approximately nine months.

Q. Have you resided in the Bay Area here?

A. Yes, sir.

Q. For about how long?

A. Nine or ten years.

Q. Are you married or single?

A. Married.

Q. Have you any children?

(Testimony of Theodore F. Bovich.)

Mr. Hoge: Objected to as incompetent, irrelevant and immaterial, your Honor.

The Court: Objection overruled.

A. Yes, sir.

Q. (By Mr. Reynolds): You were an able-bodied seaman with the Merchant Marine in October and January of 1945? A. Yes, sir.

Q. About how long had you been going to sea at that time? A. Since 1942.

Q. Were you sailing as an able-bodied seaman on board the Charles J. Colden on the 3rd day of January, 1945? A. Yes, sir.

Q. When did you sign on that ship?

A. It was in October, the first part of October. I don't remember the date of it.

Q. What is your age, Mr. Bovich?

A. Twenty-seven.

The Court: What?

A. Twenty-seven, sir. [30]

Q. (By Mr. Reynolds): Where did you sign on?

A. At the Army Base, San Francisco Harbor.

Q. After that ship left San Francisco Bay, where did it go? A. To New Guinea.

The Court: Where?

A. To New Guinea.

Q. (By Mr. Reynolds): Did it remain some time in New Guinea?

A. Well, we arrived in Finchhaven and stayed there some amount of time and then went down to Oro Bay, then up to Hollandia, another part of New Guinea, shuttled back and forth there.

(Testimony of Theodore F. Bovich.)

Q. Where was the ship located on the 3rd day of January, 1945? A. In Oro Bay.

Q. And were you moored to a dock or anchored in the stream? A. Moored to the dock.

Q. Just what kind of bay is that? Is that completely closed?

A. Well, yes, I guess it was enclosed, I would say.

Q. You were not out in the open sea?

A. No, we were inside.

Q. Were there breakwaters there?

A. Not right in this particular place.

Q. Were there docking facilities?

A. Yes, sir.

Q. Well, you said the ship was moored. Is that correct? A. Yes.

Q. Which side of the ship was moored to the dock? [31] A. The port side to.

Q. Were loading operations going on at that time? A. Yes, sir.

Q. Calling your attention to this day when you were injured, can you recall the approximate time that occurred?

A. Well, I would say it was between 9:00 and 9:30 in the morning.

Q. Did you receive an order to do this work you were performing at this time? A. Yes, sir.

Q. Who gave you the order?

A. The boatswain.

Q. Were you working at the time you received the order?

(Testimony of Theodore F. Bovich.)

A. I was working up at No. 1 Hatch.

Q. Now, just state what you did when you received this order.

A. Well, we were up there working, and the boatswain came up forward and he says for the other able-bodied seaman and myself to go get the garbage cans in the vicinity of No. 5 Hatch and bring them on forward of these boxes. So, we started to get these garbage cans and Mr. Kazem-Beck, he led the way.

Q. When you got back there, aft the midships house, were any ship's officers present, or was the boatswain present?

A. Well, not that I know of, sir.

Q. Were loading operations going on at this time when you got back there?

A. Yes, loading operations were going on.

Q. On what side of the ship were the loading operations?

A. The port side.

Q. The side moored to the dock, is that right?

A. Yes, sir. [32]

Q. All right, then. What transpired when you started to move these cans?

A. Well, he took the first can and went up on the bulwark, what I call the bulwark, the rail on the starboard side.

The Court: You will have to speak loudly enough so everybody in the courtroom can hear you.

A. Yes, sir.

The Court: Raise your voice a little bit.

(Testimony of Theodore F. Bovich.)

A. Well, Mr. Kazem-Beck, he preceded me with the first can.

Q. Who?

A. Kazem-Beck, the other able-bodied seaman.

Q. Mr. Kazem-Beck? Have we had him on the stand?

Mr. Reynolds: Yes, your Honor, the last witness.

The Court: Go ahead.

A. He proceeded on the starboard side of this rail and almost got to his destination with this can, and he slipped some way, causing the can to fall overside into the water. He fell on the inside and kind of bruised his leg a little. I kind of laughed about it. I said to myself——

Mr. Hoge: I object to what he said to himself, your Honor.

The Court: Yes, yes. That is not proper evidence.

Q. (By Mr. Reynolds): Merely state what you did.

A. So I went back to get another can, and went between these two boxes where the passageway was.

The Court: Well, you saw this Mr. Kazem-Beck, you saw him slip? A. Yes, sir.

Q. You saw the can go over?

A. Yes, sir.

Q. Then it came your turn to take a can, is that it? A. I had a can, following him.

Q. Well, you had a can. He had a can first. He preceded you? A. I preceded him, sir.

(Testimony of Theodore F. Bovich.)

Q. No. Did you come first? A. No, sir.

Q. You followed him, did you?

A. Yes, sir.

Q. All right. You saw him slip, you saw him take the can, saw him try to move it, saw him slip, saw the can go overboard. Then you took your can?

A. No, I had completed with this one particular can I had.

The Court: I don't know. You will have to go ahead, Mr. Reynolds. Begin at the beginning.

Q. (By Mr. Reynolds): All right. You saw Mr. Kazem-Beck slip when he tried to——

The Court: Who slipped?

A. Kazem-Beck.

The Court: Don't lead him. Go ahead.

Q. (By Mr. Reynolds): What did you do?

A. I went back to get the next can. I went through this passageway.

The Court: He had gone before that? [34]

A. Yes, sir.

Q. Well, now, let's see. Who was the first one to take a can and move it, according to orders?

A. Well, he took the first can, sir. Then I followed him with another one. As he slipped and fell, I still was coming in back of him with mine, my can, and I put it down, and he sat down to look at his leg. So I went back to get another can, and came through this passageway. I got in there and they had lifted another box onto the boom. They were swinging one over and hit this box on No. 4

(Testimony of Theodore F. Bovich.)

Hatch, causing it to come over and hit my leg, caught my leg between the can and the box.

Q. (By Mr. Reynolds): Where was the can at the time the box pushed over against you?

A. It was between my leg.

Q. Which way were you facing?

A. I was going backwards.

Q. Backwards, and did you have the can above the deck?

A. Well, it was above the deck, yes, sir.

Q. Were you carrying it or dragging it?

A. Dragging it.

Q. You were backing up, dragging this can?

A. Yes, sir.

Q. And were between the two crates?

A. Yes.

Q. What was the distance separating these two crates you were passing through at that time?

A. I would say three, or three and one-half feet.

Q. All right. After this crate was pushed up against you, [35] what happened?

A. Well, I hollered. I hollered for some help.

Q. What part of your leg was caught, if you know?

A. Just above the ankle, here, what I could see of it.

Q. What was it caught by?

A. This box and the garbage can.

Q. Between the box and the garbage can?

A. Yes, sir.

(Testimony of Theodore F. Bovich.)

Q. How were you finally removed from your position?

A. They finally got this box up off my leg. A couple of other fellows assisted me, laid me over on a cot there, put a bandage on my leg and took me to the hospital.

Q. What hospital were you taken to?

A. 248 General Hospital, Oro Bay, New Guinea.

Q. About how long did you remain there in the hospital?

A. About two and one-half months.

Q. What injuries did you have, if you know?

A. According to what the doctors said, fracture, compound, complete.

Q. Was there any other damage to your leg?

A. A punctured artery.

Q. Anything you could see, was the skin broken and lacerated?

A. Yes, sir.

Q. After this hospital, where did you go?

A. They transferred me to the No. 4 General Hospital at Finchhaven. [36]

Q. How long were you there?

A. About a month and a half.

Q. During this time, did you have your leg in a cast?

A. Well, I had my leg in a cast about a week before I left the first hospital, No. 248 General.

Q. What kind of treatment did they give you at the first hospital?

A. Well, they gave me penicillin. They were giving me penicillin and taking me to the operating room, the surgery room, and dressing my leg every day.

(Testimony of Theodore F. Bovich.)

Q. I mean, did they operate on your leg?

A. Yes, sir.

Q. And set the bone, is that right?

A. Yes, sir.

Q. All right, after you spent this additional time in the hospital, where were you moved?

A. Well, I came out on a transport ship and arrived in San Francisco on May 22, I believe it was, and I went to the Marine Hospital the following day and I have been an out-patient there.

Q. What was the condition of your leg at that time? A. It was draining.

Q. You had some kind of sore or ulcer on it?

A. Ulcer. That is what they called it, ulcer.

Q. How long did you remain an out-patient at that hospital?

A. Until March 6th of this year.

Q. When you left the hospital on March 6th, were you given a certificate of hospital out-patient treatment? A. Yes, sir.

Q. Is this the certificate you were furnished?

A. Yes, sir. [37]

Mr. Reynolds: I will introduce this in evidence as the Libelant's Exhibit 1.

LIBELANT'S EXHIBIT No. 1

Given to Patient

Certificate of Hospital and Outpatient Treatment

U. S. Marine Hospital, San Francisco, Calif.

Date: March 6, 1946.

1. Name of patient, Bovich, Theodore F.

(Testimony of Theodore F. Bovich.)

2. Brief abstract of patient's statement as to how and when disability was incurred. Patient states he suffered compound fracture Jan. 3, 1945.
3. Diagnosis. Compound fracture, right ankle (old).
7. Date of admission to outpatient department. May 23, 1945.
8. Date of discharge from outpatient department. Mar. 6, 1946.
9. Condition on discharge. Fit for duty out of tropics.
10. Number of days completely disabled, May 23, 1945, to Mar. 6, 1946.
12. Prognosis. Fair.

[Seal] /s/ WM. Y. HOLLINGSWORTH,
Medical Director.
Medical Officer in Charge.

ak

N. B.—This certificate is furnished to the patient to enable him to collect insurance benefits that may be due him and is to take the place of the certificate required by the insurance companies from private physicians who attend persons insured. It is compiled from the official records of the hospital and is signed by a medical officer of the United States Government over his official title.

[Endorsed]: Filed May 8, 1947.

(Testimony of Theodore F. Bovich.)

Q. This indicates the number of days completely disabled, May 23, 1945, to March 6, 1946. Is that correct? A. That is right.

Q. It also states "Fit for duty outside of tropics." A. Yes, sir.

The Court: It may be admitted.

The Clerk: The exhibit is marked Libelant's Exhibit No. 1.

(The document referred to was marked Libelant's Exhibit No. 1.)

Q. (By Mr. Reynolds): Mr. Bovich, during the time that you were serving aboard the Charles J. Colden, what were your average monthly earnings?

A. Approximately \$360.00 a month.

Q. Did the amount which you have stated include your board and room? A. No, sir.

Q. That was furnished you in addition to this amount you were paid? A. Yes.

Q. Did you receive a seaman's wage account which indicated your earnings from October 11, 1944, to January 3, 1945? A. Yes, sir.

Q. Is this that account? A. Yes, sir.

Q. Did you further receive a seaman's wage account covering [38] the period January 4, 1945, to March 23, 1945? A. Yes, sir.

Q. Is that the account? A. Yes, sir.

Mr. Reynolds: I will offer to introduce this as Libelant's Exhibit No. 2.

The Court: Admitted.

11620 Filed OCT 1 1946

U. S. Citizenship, Clerk

UNITED STATES OF AMERICA
WAR SHIPPING ADMINISTRATION
SHEPARD STEAMSHIP CO., GENERAL AGENTS

By Edward G. Dutcher
Deputy Clerk

Resident Alien
Non-Resident Alien
W4 Status A-1

SEAMAN'S WAGE ACCOUNT

S/A Charles J. Golder Voy Two Port Oro Bay - New Guinea Date Jan. 3, 1944
Name Porvoh J. Theodore Rating A B Social Security No. 557-18-1954
Last Middle First
Address 714 32nd St., Oakland California City State

EARNINGS:

	Date	Date	Mon.	Days	Rate	TOTAL
1. WAGES	From <u>10/22/44</u>	To <u>1/3/45</u>	<u>2</u>	<u>24</u>	@ <u>100.00</u>	<u>Per Mo.</u>
2. WAR BONUS	<u>33-1/3</u>	<u>10/24/44</u>	<u>-</u>	<u>10/26/44</u>	<u>3</u>	<u>-</u>
	<u>66-2/3</u>	<u>10/27/44</u>	<u>-</u>	<u>10/29/44</u>	<u>23</u>	<u>-</u>
	<u>100%</u>	<u>10/30/44</u>	<u>-</u>	<u>1/3/45</u>	<u>2 5</u>	<u>-</u>
3. AREA BONUS	<u>-</u>	<u>10/30/44</u>	<u>-</u>	<u>1/3/45</u>	<u>66</u>	<u>-</u>
4. PENALTY CARGO AND/OR EMPLOYEE BONUS	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>
5. PORT ATTACH BONUS	<u>Date</u>	<u>Port</u>	<u>Days</u>	<u>Rate</u>	<u>per day</u>	<u>-</u>
6. OVERTIME	<u>122 1/2</u>	<u>Hours @ .85</u>	<u>per Hr.</u>	<u>-</u>	<u>Sec. Watches</u>	<u>-</u>
7. MEAL ALLOWANCE ABOARD	<u>-</u>	<u>Days @</u>	<u>-</u>	<u>-</u>	<u>per day</u>	<u>-</u>
8. ROOM ALLOWANCE ABOARD	<u>-</u>	<u>Days @</u>	<u>-</u>	<u>-</u>	<u>per day</u>	<u>-</u>
9. TOTAL EARNINGS (Lines 1 to 8)	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>280 00</u>
	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>4 00</u>
	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>34 67</u>
	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>216 67</u>
	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>330 00</u>
	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>10 13</u>
	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>969 67</u>

DEDUCTIONS:

10. WITHHOLDING TAX (Show No. 8 lines 7 and 8)	<u>Days @</u>	<u>Rate</u>	<u>per day</u>	<u>per day</u>	<u>per day</u>
Less Exemptions <u>84</u>	<u>Days @</u>	<u>Rate</u>	<u>per day</u>	<u>per day</u>	<u>per day</u>
11. SOCIAL SECURITY TAX (Show No. 8 lines 7 and 8)	<u>Days @</u>	<u>Rate</u>	<u>per day</u>	<u>per day</u>	<u>per day</u>
Plus Bond & Tax <u>1.28</u>	<u>Days @</u>	<u>Rate</u>	<u>per day</u>	<u>per day</u>	<u>per day</u>
12. ALLOTMENTS (Nov., Dec., Jan.) @ <u>\$99.00</u>	<u>Days @</u>	<u>Rate</u>	<u>per day</u>	<u>per day</u>	<u>per day</u>
13. ADVANCES	<u>Days @</u>	<u>Rate</u>	<u>per day</u>	<u>per day</u>	<u>per day</u>
14. SLOPS	<u>Days @</u>	<u>Rate</u>	<u>per day</u>	<u>per day</u>	<u>per day</u>
15. FINES	<u>Days @</u>	<u>Rate</u>	<u>per day</u>	<u>per day</u>	<u>per day</u>
16. TOTAL DEDUCTIONS	<u>Days @</u>	<u>Rate</u>	<u>per day</u>	<u>per day</u>	<u>per day</u>
17. BALANCE DUE	<u>Days @</u>	<u>Rate</u>	<u>per day</u>	<u>per day</u>	<u>per day</u>

18. BALANCE DUE

443.10

I CERTIFY THAT THIS PAYROLL VOUCHER IS TRUE AND CORRECT; THAT THE PERSON MAKING THIS STATEMENT IS THE PERSON WHOSE NAME APPEARS ON THE VOUCHER; AND THAT THE PERSON WHOSE NAME APPEARS ON THE VOUCHER IS ENTITLED TO THE AMOUNT OF PAY STATED ABOVE.

Edward G. Dutcher (Master)
Paid full balance as in accordance with the above

Received Payment in Full

Certified as Correct

(Payee)

No.

UNITED STATES OF AMERICA
WAR SHIPPING ADMINISTRATION
SHEPARD STEAMSHIP CO., GENERAL AGENTS

Resident Alien
Non-Resident Alien
W-1 Status

SEAMAN'S WAGE ACCOUNT

S/A **CHARLES J. COLDE** Voy **2** Port **San Francisco** Date **Mar 28, 1945**

Name **Bevish** Y **Theodore** Rating **A.B.** Social Security No. **577-18-1954**
 Local Middle First
 Address **2828 Chestnut Street,** **Oakland** State **California**
 Street No. City

EARNINGS:

	From	Date	To	Date	Mon.	Days	Rate		TOTAL
1. WAGES		1/4/45		3/23/45	2	20	@ 100.00	Per Mo.	265 67
2. WAR BONUS	33 1/3%	5/20/45		5/22/45	3		40.00	"	4 00
	66 2/3%	5/12/45		6/19/45	8		80.00	"	21 33
	100 %	5/27/45		5/12/45	2 7		100.00	"	23 33
3. AREA BONUS		5/27/45		5/13/45	8		5.00	Per Day	40 00
4. PENALTY CARGO AND/OR EXPLOSIVE BONUS								"	
5. PORT ATTACK BONUS								"	
6. OVERTIME								"	
7. MEAL ALLOWANCE ASHORE								per day \$	
8. ROOM ALLOWANCE ASHORE								per day \$	
9. TOTAL EARNINGS (Lines 1 to 8)									355.33

DEDUCTIONS:

10. WITHHOLDING TAX (Lines No. 8 less 7 and 8)									
Less Exemptions 72	Days @								
11. SOCIAL SEC. TAX (Lines No. 8 less 7 and 8)									
Plus Board & Log	Days @								
12. ALLOTMENTS									
13. ADVANCES									
14. SLOPS									
15. FINES									
16.									
17. TOTAL DEDUCTIONS									11 48
18. BALANCE DUE									343.88

I CERTIFY THAT THIS PAYROLL VOUCHER IS TRUE AND CORRECT; THAT THE PERSON NAMED HEREON IS EMPLOYED BY THE UNITED STATES OF AMERICA FOR THE PERIOD AS STATED ABOVE; AND THAT THE PERSON WHOSE NAME APPEARS ON THIS PAYROLL VOUCHER IS ENTITLED TO THE AMOUNT OF PAY STATED ABOVE.

Paid in full before use in accordance with the above

Master)

Received Payment in Full

Theodore F. Bevish
 Certified as Correct

(Payee)

The Clerk: The exhibit is marked Libelant's Exhibit No. 2.

(The document referred to was marked Libelant's Exhibit No. 2.)

Q. (By Mr. Reynolds): From the time you were an out-patient on the 23rd day of May, 1945, until you finally returned to work, were you compelled to maintain yourself? A. Yes, sir.

Q. Do you know approximately what it cost you to maintain yourself during that period of time? A. Approximately——

Mr. Hoge: Your Honor, I think that is incompetent, irrelevant and immaterial. The amount of maintenance universally allowed is \$3.50 a day.

Mr. Reynolds: I will be willing to stipulate to that.

The Court: Very well.

Q. (By Mr. Reynolds): Mr. Bovich, after you finally left the Marine Hospital, when did you return to work?

A. Well, after I was out of the Marine Hospital, got a discharge there, my wife and mother-in-law, we went to pick some grapes at Mrs. Anderson's ranch, to more or less give my [39] leg a test. The doctor told me to try some light work. So, when I picked these grapes for about four days, and the boxes were too heavy for my leg, so I went back to the Marine Hospital again and got my bandage removed. I told the doctor the particular work I was doing, and told him the approximate weight of the boxes with the grapes. He told me to take it a little easier, then.

(Testimony of Theodore F. Bovich.)

Q. He advised you to do light work, is that it?

A. Yes, sir.

Q. When did you finally return to work at your former job? A. About three weeks ago, sir.

Q. What type of work is that you do?

A. Acetylene burner.

Q. How long had you done that type of work before you went into the Merchant Marine?

A. Roughly, about two and one-half years.

Q. Now, could you just describe for the Court the present condition of your leg?

A. Well, right now, when I do any considerable amount of walking, my leg seems to tighten up on me, seems like it is swollen, is tightening, more or less.

The Court: Where is the break, below your knee? A. Right here.

Mr. Reynolds: Just pull up your pants there, and indicate it.

The Court: You say, when you walk. What do you mean?

A. I mean any considerable amount of walking I do. [40]

Q. You mean the leg will swell?

A. It seems that way, sir. But it tightens on me, gets tight, then I cannot bend my toes fully, and it is pretty sensitive around that punctured artery.

Q. Does it make you lame, make your leg heavy?

A. Tightens.

Q. What do you mean, tightens?

(Testimony of Theodore F. Bovich.)

A. It feels like it is swollen, gets tight.

Q. Is it really swollen?

A. I don't know if it is swollen, sir, it gets tight on me.

Q. Does it pain you?

A. Yes, sir, not very much, though.

Q. But you are conscious of it? A. Yes.

Q. If you sit down and take a rest, I suppose that helps it?

A. It helps it, but I found out in this particular job I have, when I come home in the evenings, I kind of have a throb.

Q. In the leg? A. Yes.

Q. Where is the throb?

A. Right near the toes where it feels tight.

Q. No throbbing up to the knee?

A. No, sir. If I try to run, that muscle back here, when I move, even do that, it causes that punctured artery to feel like something is pinching it.

Q. No pain?

A. If I try to run, it does.

Q. How old are you?

A. Twenty-seven, sir.

Q. (By Mr. Reynolds): On your present job, what type of work do you have to do? Just describe your activities a little bit. [41]

A. Well, according to wherever the place is, so I have to climb the ship. I have difficulty climbing.

The Court: Are you on a ship now?

A. I work for the American Ship Wrecking

(Testimony of Theodore F. Bovich.)

Company, cutting these old ships up for scrap, and I find it pretty difficult to go up steep steps. So I go sideways because I haven't the full motion of my leg right here, today, yet.

Q. Well, but you go up all right?

A. Yes, sir.

Q. (By Mr. Reynolds): Then you are conscious of this leg during the time you are working, is that right? A. Yes, sir.

Q. Now, did you receive some maintenance from either the War Shipping Administration or the company, after you were an out-patient at the Marine Hospital, did you not? A. Yes, sir.

Q. Can you recall approximately the period of time over which you were paid this maintenance?

A. I don't remember that, sir.

Q. Can you remember about the last time you got a maintenance check?

The Court: Do you remember how much you received?

A. I believe I received a little better than \$400 the entire time. I don't remember when was the last check I received.

Mr. Reynolds: Do you have those figures, Mr. Hoge? Anything you have, I am willing to stipulate to.

Mr. Hoge: I have some receipts here. I have a receipt here for \$932.83 maintenance, your Honor.

Mr. Reynolds: Maintenance, or maintenance and wages?

Mr. Hoge: Maintenance. It totals \$355. He has been paid maintenance right up until this date.

(Testimony of Theodore F. Bovich.)

Mr. Reynolds: No, it will be stipulated that the Libelant was paid his maintenance until December 18, 1945.

Mr. Hoge: December 18th, yes.

Mr. Reynolds: And I am willing to stipulate further that he received his unearned wages up until the end of the voyage.

The Court: What?

Mr. Reynolds: Which ended on the 23rd of March, 1945. So, that the only claim for maintenance would be from December 18, 1945.

The Court: To March 6, isn't it?

A. Yes, sir.

Mr. Reynolds: Well, maintenance until he returns to work.

Mr. Hoge: 78 days. He was discharged, able to return to work, work outside of the tropics, on March 6, which would make 76 days additional maintenance.

Mr. Reynolds: That is a question for the Court to determine.

The Court: I know, but if maintenance is due, will you gentlemen agree how much is due, if it is due.

Mr. Hoge: \$3.50 a day. [43]

The Court: From December 18?

Mr. Hoge: December 18, 1945, to March 6, 1946, your Honor.

Mr. Reynolds: We are in agreement on it that far, your Honor.

The Court: What?

(Testimony of Theodore F. Bovich.)

Mr. Reynolds: We are in agreement on it that far, but the Libelant was not able to return to work at that time, so we are claiming maintenance until he is able to return to work.

The Court: Well, when was that?

The Witness: In September, sir.

Q. (By Mr. Reynolds): What date did you return to work?

A. The latter part of September.

Mr. Hoge: Your Honor, here is the Libelant's Exhibit. It says "Fit for duty outside of tropics, March 6, 1946."

The Court: Go ahead.

Q. (By Mr. Reynolds): What is the name of the company for which you are working at the present time?

A. The American Ship Wrecking Company.

Q. About how long have you been working there?

A. Oh, now I have been working there about ten days.

Q. Did you work for any other concern before you went to work for the American Ship Wrecking Company?

A. Yes, sir.

Q. What is the name of that company? [44]

A. The General Engineering Company.

Q. What type of work were you doing there?

A. That was the same type of work.

Q. And what was the date you started to work there?

A. That was in September some time.

Q. September of 1946?

(Testimony of Theodore F. Bovich.)

A. Yes, sir. I worked there for about four days, then I got laid off.

Q. And prior to that time the only work you did between May of 1946 and September of 1946, was the grape picking for about four days. Is that right?

A. Yes, sir.

Mr. Reynolds: I think that is all.

Cross-Examination

By Mr. Hoge:

Q. Mr. Bovich, this loading operation that was being performed at the time, was being done by the Army stevedores, was it not?

A. Yes, sir.

Q. And the Army stevedores were handling the winches, and, of course, handling the loading and unloading gear of the ship?

A. As far as I know, sir.

Q. You say you are an able-bodied seaman?

A. Yes, sir.

Q. And as such you have been taught, and it is one of the duties of an able-bodied seaman, to keep from placing himself underneath a load when it is going over the deck. Is that right?

A. I was not under the load, sir.

Mr. Reynolds: I object to that question. [45]

The Court: The objection is overruled. Answer the question.

A. I was not under the load, sir.

The Court: Oh, no. Can't you answer the ques-

(Testimony of Theodore F. Bovich.)

tion? You were not asked whether you were under the load or not. Read the question.

(Question read by the Reporter.)

The Court: Yes or no.

A. Yes, sir.

The Court: Now, if you wish to explain that, you may. You said you were not underneath the load.

A. Yes. That is what I understood him to say.

Q. (By Mr. Hoge): Mr. Bovich, when a ship is being loaded or unloaded, the booms are not in use at all times, are they?

A. Well, it is according——

The Court: Will you answer the question, please.

A. Yes, sir.

The Court: If you answer the question, if you wish to explain your answer, you may.

Q. (By Mr. Hoge): Now, as you say, the booms were not always in use, the gear was not being used constantly. Is that right? Put it this way: For instance take the boom it is loading crates, the boom will move over and there will be some period of time there during which they are fastening the slings around the crate so that it can be raised. Is [46] that right? A. Yes, sir.

Q. During that time the boom is not being moved?

A. Not that particular moment, no, sir.

Q. After they get the sling around the crate, then with the use of the boom they will raise it, carry it over to the point where they can let it down.

A. Yes, sir.

(Testimony of Theodore F. Bovich.)

Q. And after the thing has been let down, the boom remains motionless for some period of time until they can get the sling off of it, isn't that right?

A. That is right.

Q. And, as you testified, I believe, and your witness here, you received orders to take these empty garbage cans and carry them to some part of the ship there.

A. Yes, sir.

Q. You were not told how to do it, by what route to go, were you?

A. No, sir.

Q. Now, regarding your injury, prior to your going to sea, and incidentally since December 7, 1941, was when you went to sea first, wasn't it?

A. 1942, sir.

Q. Your regular occupation is that of an acetylene torch operator, isn't it?

A. Yes, sir.

Q. You had done that, you had taken that up as a trade before, had you not, Mr. Bovich?

A. Yes, sir.

Q. Now, some time after you were certified by the Marine Hospital as able to resume work outside of the tropics, you took a job with the General Engineering Company, did you not?

A. Yes, sir. [47]

Q. The General Engineering Company is a ship and drydock company, some such name?

A. Yes, sir.

Q. You worked there until such time arrived that they had no further work for you?

A. Yes.

Q. And after that you took up employment with this concern you are with now, that is, the American Shipwrecking Company.

A. Yes, sir.

(Testimony of Theodore F. Bovich.)

Q. And you started to work for them when, in September?

A. I believe that is when it was, the latter part of September or early October.

Q. You are still working for them, are you not?

A. Yes, sir.

Q. Performing the duties of an acetylene burner? A. Yes, sir.

Q. You are being paid \$360 per month for doing that work, are you not? A. No, sir.

Q. What are you being paid?

The Court: Read the question.

(Question read by the Reporter.)

A. \$1.45 an hour, sir.

Q. (Mr. Hoge): Do you remember your deposition having been taken by Mr. Schaldach, the gentleman sitting at the trial table back there, on September 30, 1946? A. Yes, sir.

Q. I will just ask you to read from the top of page 15, line 1, down to line 5 of your deposition.

Mr. Hoge: Shall I hand it to the witness? [48]

The Court: Yes, please.

Mr. Hoge: Just read it to yourself.

A. From line 11, you say?

Q. Line 1 to line 11, Mr. Bovich. Did you read that? A. Yes.

Q. Could you explain if there is some misunderstanding there? What did you mean by \$360 a month, including room and board?

A. I did not quite understand the room and

(Testimony of Theodore F. Bovich.)

board. I did not know if that was included, or otherwise, until I thought for a moment.

Q. On this American Shipwrecking Company?

A. No, sir. That concerns the ship, doesn't it?

Q. That is what I want to find out. I will read it, if there is a misunderstanding:

“Mr. Reynolds: Just a minute. You said \$360. That is \$360 a month?

“Mr. Schaldach: I said a day. That is \$360 including room and board? A. Yes.”

Now, did you refer to that on the ship when you had your accident, or was that with this American Shipwrecking Company?

A. That was on the ship when I had the accident.

Q. Go back to page 14, line 18:

“Q. Where are you working now?

“A. American Shipwrecking Company. [49]

“Q. Since what date have you been working there? A. About eight or nine days.

“Q. What was your average monthly wage while you were on the——”

What is the name of the ship you were on?

A. The Charles J. Colden.

Q. That \$360 meant the wages you were paid while aboard the ship, then? A. Yes, sir.

Q. And in this occupation of yours as an acetylene torch welder you do welding, cut steel and all that, don't you? A. Yes, sir.

Q. You earn \$1.45 an hour? A. Yes, sir.

Q. You are paid \$10.60 a day?

(Testimony of Theodore F. Bovich.)

A. Approximately that.

Q. And your salary would be around \$240, or \$250 a month? A. Yes, sir.

Q. Now, this \$360 that you mentioned you were earning was the amount of your pay including the War Bonus, was it not? A. Yes, sir.

Q. Now, in August, after V-J Day, the Government terminated that, did it not, the War Shipping Administration? A. Yes, sir.

Q. And you received \$100 a month with room and board, and then it was in September or October they increased that to \$145, did they not?

A. Well, I don't know what their agreements were. [50]

Q. But you do know it was terminated, this bonus, around August after V-J Day?

A. Yes.

Mr. Hoge: That is all. No further questions.

Mr. Reynolds: That is all.

The Court: That is all.

(Witness excused.)

Mr. Reynolds: If it please the Court, the only other witness we were going to call is the doctor. I did not anticipate we would finish quite so soon. I have him scheduled to appear at 2:00 o'clock.

The Court: Why do you want a doctor?

Mr. Reynolds: There are some injuries, if it please the Court, that are not clear to the eye. I mean, there was an operation that was performed; there is still a screw in his leg that he could not

testify to, which would have to be shown by X-rays, and I believe would be helpful.

The Court: I don't see how it would be material here. I don't think there is sufficient evidence here to establish negligence.

Mr. Reynolds: Well, if it please the Court, of course——

The Court: I don't see it at all. I can see he is entitled to maintenance and cure. The question is, how much. He may be entitled to some maintenance and cure. Right up to this moment I cannot see where negligence has been established. [51]

Mr. Reynolds: If it please the Court, the Libellant was working on a ship.

The Court: I know he was working on a ship.

Mr. Reynolds: He was carrying out orders.

The Court: Admitted.

Mr. Reynolds: He was placed in a dangerous position.

The Court: Moving garbage cans. I cannot see it at all, having in mind all of the testimony that has been adduced here. I tell you right now, Mr. Reynolds, I cannot see where you have established negligence.

Mr. Reynolds: If it please the Court——

The Court: Wherein you think you have. Now, just tell me.

Mr. Reynolds: Perhaps I could illustrate here a little with the board.

The Court: Yes. You have no further evidence except the doctor, have you?

Mr. Reynolds: No, your Honor.

The Court: His leg was broken. I guess there is no question about that. He was injured. There will be no further testimony on the question of negligence?

Mr. Hoge: None, your Honor, at all. We have the deposition.

The Court: You have a deposition you want to read?

Mr. Hoge: No, your Honor. I say, we have his deposition [52] in court.

Mr. Reynolds: If it please the Court, according to the testimony of the witnesses who appeared on the stand here, Mr. Bovich and Mr. Kazem-Beck were working at—this will be forward on No. 1 Hatch, when the boatswain ordered them to go to the rear of the ship to the No. 4 or No. 5 Hatch, and move some ash cans that were stowed back here, up to the hatch aft of the deck house, or the bridge house. At that time the ship was moored port side to, to the dock. The booms were over the side and loading operations were being conducted. The mate and the boatswain knew those operations were going on at the time when they sent these two men back here to move these cans.

The Court: Empty cans.

Mr. Reynolds: Empty cans.

The Court: Empty cans.

Mr. Reynolds: At that time there arrived, there were these two large crates in this particular area, which is the starboard side of No. 4 Hatch. There was other gear stowed on the ship.

The Court: Other what?

Mr. Reynolds: Other gear, and this passageway was obstructed.

The Court: I have not heard anything about any passageway being obstructed. [53]

Mr. Reynolds: Yes, your Honor. That is the whole point. These crates were right in the passageway and obstructed this movement of these cans.

The Court: Well, they could lift them up. They were empty cans. It is in evidence here that they could have been lifted up and passed over.

Mr. Reynolds: Yes, your Honor. They had to pass between the crates to get on the other side. These crates were six to eight feet high. While the Libelant was passing between these crates, following out orders, another crate being swung aboard struck this crate on the port side, pushed it against him, crushing his leg. There was nothing he could have done to prevent the accident; no other passage he could have used. The loading operations were being conducted on the port side of the ship, swinging cargo aboard. It is a rudiment of good seamanship that a man will not work on the side of a ship where there is loading. There was nothing to give them warning that loading was being conducted on this side; there was no other passage they could use. Mr. Kazem-Beck attempted to go along the bulwark; he slipped; he was unsuccessful in going by that way, he dropped the can over-side. Mr. Bovich, the Libelant, walked between the crates and it was clearly negligence in swinging the third crate over and striking the other crate.

In the first place it was negligence in sending a

man [54] back there where the boatswain and the mate knew they would have to go through the narrow passageway while loading operations were being conducted. In that way they failed in their duty to furnish a safe place to work and gave a negligent order. There was no supervision of the work by any ship's officers, or by the boatswain at this time, when they knew loading operations were going on. They knew there were things going to be placed and when.

The Court: Who was the boatswain?

Mr. Reynolds: The boatswain's name was Malone.

The Court: The boatswain has not appeared here at all.

Mr. Reynolds: No, sir, the boatswain remained away on the forward part of the ship. None of the ship's officers were present at the time the accident occurred. I think under those circumstances, if it please the Court, I could produce numerous authorities that will show that the owner and operator of the ship was negligent in their duty toward the seamen under the Jones Act, the Employers Liability Act. There is a much greater duty imposed upon the employer than there is in the ordinary negligence case.

The Court: I don't think so. There is nothing in that statement at all. The same rule, no, no, no, the same rule of negligence would apply under the Jones Act as in any other suit for negligence. Of course, in all these cases, we have, of course, the rule which we all recognize, that a seaman is [55]

a ward of the court, and he must receive the protection of the court, and the Court of course is always more liberal toward seamen than toward any other litigants I know of. In this court we try to protect them. I don't know as we serve him. We hope to be fair to all litigants, but I always have in the back of my head, when I am trying these cases, that the seaman is a ward of the court; he is to receive the tender protection of the court, the solicitous protection of the court. We always try to do that. But, having all those things in mind, Mr. Reynolds, I do not see any evidence, or sufficient evidence in any sense of the word to support the claim here of negligence. Now, of course I may be wrong.

Mr. Reynolds: If it please the Court, I sincerely believe there is the act of the Army stevedores in swinging this huge crate over, negligently striking the crate where the man is working, was clearly negligent, and the operator of the ship would also be responsible for the control of loading that cargo, and I believe there is a very recent case decided in the Washington District that stated the operator and employer in that case would be responsible for the negligence of an Army stevedore.

The Court: Yes, well, where is the negligence? They were loading, they were actually busy on this ship, it was wartime, wasn't it?

Mr. Reynolds: Yes, your Honor. [56]

The Court: Yes.

Mr. Reynolds: But they still had time to bring in the garbage scows, and they had regulations.

The Court: But the garbage had been emptied off the ship, because the cans were empty, the garbage had been dumped. These men were ordered to move empty cans.

Mr. Reynolds: That is correct, your Honor.

The Court: Yes.

Mr. Reynolds: That is why it was unnecessary to do that.

The Court: Unnecessary to move the empty cans or what?

Mr. Reynolds: Unnecessary to move the empty cans at that time and place them in this position where they were loading.

The Court: How do we know when the proper time was to move the cans? If the cans were empty, probably they had a station on the ship to which the boatswain or someone on the ship in authority thought the cans should be moved, placed in their stations where they were before. Now, an order was given to do that sort of thing and something happened. Where is the testimony to show there was any negligence here?

Mr. Reynolds: Well, your Honor, you might take the example of an automobile accident. Suppose a person is [57] standing behind a box and someone negligently drove an automobile into that box and injured them.

The Court: Where?

Mr. Reynolds: Any place. There would be negligence.

The Court: Any place. That is so uncertain. Any place does not mean anything. That don't

help at all. Oh, no, there has to be some proof of negligence. We just cannot guess at negligence. There must be some proof of negligence. Now, where was the negligence? Was it the negligence of the boatswain, or somebody on the ship, to say to the men on the ship, "Move those cans back, or put them some place on the ship?" Was there any negligence in that?

Mr. Reynolds: Yes, there was, your Honor, when they sent these men back where they were swinging two-ton crates around, to move them at that time.

The Court: What two-ton crates? I don't know what you are talking about.

Mr. Reynolds: Well, these two crates through which they were required to pass were two-ton, the crate that was struck.

The Court: You say that very definitely. I don't remember testimony as definite as that. You say that definitely because that is your theory in the case. Has that thing been proven?

Mr. Reynolds: Mr. Kazem-Beck testified to that, that [58] there were tractors or tanks in these crates or boxes. That required the large boom to move the crate and get it off of Mr. Bovich's leg after the accident occurred. He was not able to do it with this large stanchion. These were dangerous operations being performed there at that time that these men were sent back there.

The Court: All right, that may be true, but I don't see the connection here. I don't see the connection here. That is to say, I cannot see it so

clearly as you do, that the testimony establishes the charge that there was negligence. He was injured, yes; he was hurt on the boat. There is no question of it. I think he is entitled to maintenance and cure to some extent. I cannot see sufficient proof of negligence.

Mr. Reynolds: If it please the Court, there were the primary duties of the employer and the operator of the ship to furnish seamen a safe place to work.

The Court: Yes, I know, a safe place to work. I have heard that so often. It has been dinned into our ears. We know it above all things. At the same time, you have to establish a case to the satisfaction of the Court that negligence has been established. Now, I don't think it has been established; I don't think it has.

Mr. Reynolds: I believe, respectfully, your Honor, that the evidence shows they did not furnish them with a safe [59] place to work.

The Court: He was hurt, therefore he did not have a safe place to work. Now, you have to prove that by the testimony, and you have to prove it by reputable testimony, testimony worthy of credence, testimony that is substantial and satisfactory to the Court or a jury. Now, I say to you that my judgment here is, as far as I heard the testimony, that you have not established negligence. There is no question but what this man was injured, and he was seriously injured. Now, I think he would be entitled to maintenance; how much, I don't know. That will appear in time. I don't question that he was

injured and seriously injured, but through the negligence of the ship, I don't know. [60]

Mr. Reynolds: I believe through the negligence of the stevedores——

The Court: No, there is no evidence to support that at all, that I see.

Mr. Reynolds: In swinging this huge crate over and striking the other crate.

The Court: He was hit by a crate, all that sort of thing by loading going on, but that does not establish negligence. Do you mean they would have to stop all activity on the ship for a couple of sailors to move empty garbage cans? That is absurd that all work must stop on the ship until these men move a couple of garbage cans. [60] That cannot [Balance of sentence omitted in copy.]

Mr. Reynolds: I agree with you.

The Court: That being so, you have to establish under all the rules of evidence the fact that there has been negligence. My state of mind right now is that you have not established negligence. I say the man was hurt, he was seriously hurt; he is entitled to maintenance and cure, entitled to it. I cannot see that you have established negligence which would entitle you to damages.

Mr. Reynolds: It is not the contention that loading operations must cease. It is the contention that this was an unnecessary bit of work, not necessary to be performed.

The Court: You must establish negligence.

Mr. Reynolds: Yes, your Honor.

The Court: I have given you my state of mind.

I don't think that you have established negligence. I may be in error on that.

Mr. Reynolds: Would you care for me to submit a memorandum?

The Court: What for, to argue the facts?

Mr. Reynolds: No, to argue the law.

The Court: No, you know the law; I hope I do. I can give you the definition of negligence. I have been trying cases of negligence many, many years. I can give you the definition of negligence as we find it in the law, as I give it to the juries every time I try one of these negligence [61] cases with a jury, but you have not established negligence. He was hurt, he was seriously injured, there is no question of it, but I cannot see the negligence. That is, I don't think your testimony is sufficient to establish negligence. That is my thought about it.

Now, it is five minutes to 12:00. I am going to continue this matter to 2:00 o'clock. If you want to take it up further, you can take it up further. If you have some other testimony you want to put in, I will hear it at that time. As far as the doctor's testimony, I cannot see that I want to hear anything about that.

Mr. Reynolds: All right, your Honor.

The Court: Unless you feel it would be helpful or impressive. He had a serious break of his leg, did he not. You admit that, don't you?

Mr. Hoge: Yes, not permanent, but serious.

The Court: Well, he had a serious fracture. If you feel you want to put the doctor on on that question——

Mr. Reynolds: Yes, your Honor. Well, there is a contention to the effect that he was unable to work for a period of time after he was discharged from the Marine Hospital, and he would be entitled to maintenance during that time until he returned to work. Perhaps you would like the doctor's testimony on that point.

The Court: Well, the doctor is going to be here at 2:00? [62]

Mr. Reynolds: Yes, your Honor.

The Court: Well, put him on the stand and we will discuss this matter further.

Mr. Reynolds: Yes.

The Court: I am not foreclosing you now, even on the negligence. I mean, if you have got something that can show it, as far as my state of mind is concerned, I think I could change it, but I cannot see it now. Now, of course, Mr. Hoge, I don't want you to go astray on this thing. If you think I am in error on this thing, I would rather be put right. You are representing the Government, are you not?

Mr. Hoge: Do you want me to make a statement?

The Court: I say, you are representing the Government?

Mr. Hoge: Yes. I think he has a claim for maintenance and cure, certainly not a claim for negligence.

The Court: That is my thought about it.

Mr. Hoge: For instance, these men are all 21 years of age and over, they are experienced seamen.

They were not told how to go to a particular place, what method of doing it. It was a case of some empty garbage cans there; the boatswain told them to take them somewhere. They knew loading operations were going on by the United States Army. They knew that from time to time loads would be brought across there, and Mr. Kazem-Beck, the witness here, said he did not want to take the chance of going in where this man Bovich went. There is no negligence there at all. True, as you say, they are entitled to maintenance and cure.

The Court: There is always a risk in working about a ship. Seamen know that.

Mr. Reynolds: Which is not assumed by the seamen, your Honor.

The Court: But there is always the risk of the sea; there is always that risk.

Mr. Reynolds: They were not at sea, your Honor.

The Court: They were in a dangerous occupation, men who are on ship. We all recognize it.

Mr. Reynolds: That is why care should be taken to protect them, your Honor, by the officers.

The Court: Well, you have got to show your negligence just the same. They take these risks; they are bound to take these risks. Any step they take on shipboard, they take a risk.

Mr. Hoge: That is why they are given maintenance and cure, your Honor.

The Court: And the protection they do. The seaman is offered unusual protection by the law and by the courts, but when it comes to the question

of negligence, you have got to prove negligence. You cannot assume it, you cannot just guess at it. You cannot say "Well, because you know we must be generous to the sailor, we must give you the benefit of [64] the doubt and say there is negligence". You cannot do that, because he was hit, because he was hurt, say there must be negligence. You cannot do that.

At any rate, I will continue it to 2:00 o'clock.

(Adjourned to 2:00 o'clock p.m. this date.)

Friday, October 18, 1946, 2:00 o'clock p.m.

The Court: The case of Theodore F. Bovich vs. United States, on trial.

Mr. Hoge: Ready, your Honor.

Mr. Reynolds: Ready. Call Dr. Eaves, please.

DR. JAMES EAVES

called as a witness on behalf of Libelant; sworn.

The Clerk: Doctor, will you state your name to the court? A. James Eaves.

Direct Examination

By Mr. Reynolds:

Q. Doctor, where do you maintain your office?

A. Medical Building, Nineteenth and Franklin, Oakland.

Q. How long have you been practicing in Oakland and the Bay area? A. Since 1914.

(Testimony of Dr. James Eaves.)

Q. Are you a duly qualified and licensed physician of the State of California? A. I am.

Q. And what was the medical school from which you graduated?

A. University of Edinburgh, Scotland.

Q. And could you give us the date?

A. 1910.

Q. Subsequent to your graduation from the University where did you practice?

A. From there I went to Oxford, and later to Guy's Hospital, London, and then I came to America, and then I taught at Stanford for a while, and then I entered [66] private practice.

Q. What type of instruction did you give at Stanford? A. General surgery.

Q. And you have been practicing then in the bay area since 1914, is that correct? A. Yes.

Q. Are you acquainted with the libellant, Theodore Bovich? A. I am.

Q. Have you had an occasion to examine him with reference to an injury that he sustained to his leg?

A. Yes, I first saw him August 3rd of 1945, and I have seen him subsequently several times since.

Q. Would you state the condition that you found existing at the time that you first examined him?

A. At the first visit he showed an ulcerated area on the lower part of the affected right leg, with an ulceration that wasn't completely healed, and he had limitation of motion at that time in his

(Testimony of Dr. James Eaves.)

ankle joint, and apparently had had an operation performed for a fracture of the lower third of his leg, in which, to retain the fragments, a metallic screw had been inserted.

Mr. Hoge: This was in August of 1945?

A. August of 1945, the 3rd of August when I saw him.

Q. (Mr. Reynolds): And the wound or the ulcerated area was still draining at that time?

A. At that time it was draining, a small area.

Q. Did you see him subsequent to that time?

A. I have on [67] several occasions.

Q. What was the last occasion upon which you saw him? A. 9/20/46.

Q. That would be September of 1946?

A. Yes.

Q. And would you just describe the condition of his leg at this time that you examined him in September?

A. The ulcerated area was well-healed. The scar resultant from the injury that he sustained on January 3rd of '45 was adherent to the underlying bone, and the main factor outside of the scar that he complained of was the inability to walk evenly up and down without pain, which he complained of going down the lower part of the—lower two-thirds of his leg to his toes.

Q. Would that be described as a limitation of motion?

A. To examine him without any infection, it was a bit difficult to tell what the situation was, so I

(Testimony of Dr. James Eaves.)

took further X-rays, what we call stereoscopic, because you could examine the *anxles*, right and left, and they were comparatively equal. Then this man spoke of the discomfort that he had going up and down stairs and he had to walk sidewise, he said, because of pain. And then I went on with further examination to determine the cause of that.

Q. In your further examination what did you determine was the cause of this, you might call it, voluntary limitation of motion?

A. The screw that was inserted to retain the fracture, as I can show by the X-ray, was penetrating through to the tendons [68] that supply the muscle—the tendons of the muscle that supply the toes were being impinged upon on certain active motions requiring, we will say, extension.

Q. Do you find any of the X-rays that show that pin? A. I have, yes.

Mr. Reynolds: I wonder if we might illustrate with those at this time.

Mr. Hoge: All right, sir.

Q. (Mr. Reynolds): These are the X-rays that were taken in September, '46, is that correct?

A. No, these are the ones taken 8/3/45, which show—taken in two views, and show this metallic screw here with an excellent alignment of the fractures, and good union of the bone, and no inflection around the screw. This is the side view showing the side view of the thing, showing the same thing there, but you do not see any infection around

(Testimony of Dr. James Eaves.)

the screw—good, firm, bony union, and so on. Now, because of the persistence of his complaint——

Mr. Reynolds: We better keep these separate. I offer to introduce these into evidence as Libelant's next in order. Better have them separated, I believe.

(The X-ray referred to was marked Libelant's Exhibit No. 3 in evidence.)

The Witness: Because of his persistence in reference to this difficulty of going up and down and having to go so long sideways with his feet, I decided to take a new series as of [69] 9/20/46, stereoscopic in character. The reason why I did this when I was trying to locate the reason why he complained that he had to go sideways up and down, we will say inclines up or down, I felt a tender spot in the lower third of his leg down here on pressure, and he said, "That is where the bone aches, and it aches down to my toes." So I took these stereoscopic pictures. This is taken from the fore back, what we call A-P, and that is of course almost similar to the ones prior. But this one I tilted at a little angle, this stereoscope, and you can see here is the front of the leg where this screw is pointing out into the tendons—that area (indicating).

Mr. Reynolds: All right. We will offer to introduce these exhibits that were taken in September of 1946 as Libelant's exhibit next in order.

(X-rays were marked Libelant's Exhibit 4 in evidence.)

(Testimony of Dr. James Eaves.)

Q. (Mr. Reynolds): Doctor, during the course of your examination did you note any atrophy in the injured leg?

A. Yes, but that could be ascribed to the lack of active use of that because of favoring it; it wasn't due to an actual disease, but you would say from disuse.

Q. Did you note any tenderness in the scar and the scar tissue?

A. Yes, the scar was tender and adherent to the underlying periosteum of the bone.

Q. Would that tend to cause any limitation of motion?

A. Not especially, because it is on the outer smooth shaft of the bone and not over the muscles.

Q. Now, Doctor, from your examination of Mr. Bovich in September of 1946, would you please state what the future will be as to that injury in that leg?

A. The scar is so adherent to the underlying bone that it could easily by the slightest bruise break down and become ulcerated, and those types of scars are always difficult to heal. But being young now it would be more fortunate. As he grows older that scar will give him trouble. Then to stop that complaint of his going up and down declines, I think the screw should be removed so that it doesn't hit the tendons—extensor tendons that supply the toe; then I think he would be free of that pain.

Mr. Reynolds: That is all.

(Testimony of Dr. James Eaves.)

Cross Examination

By Mr. Hoge:

Q. Doctor, in the reduction of this fracture, the doctor who performed the work got an excellent result?

A. Excellent as regard to the union of the bone.

Q. If there should be any infection or discomfort set up as a result of the pin that is there, it is very minor to remove it?

A. It isn't a serious operation to remove that.

Q. It requires about a week's disability, doesn't it?

A. I would say two to three.

Mr. Hoge: That is all.

Mr. Reynolds: That is all, Doctor.

I would like to recall Mr. Bovich to the stand.

THEODORE F. BOVICH

the libelant, recalled as a witness in his own behalf, and having been previously duly sworn, testified as follows:

Mr. Reynolds: May it please the Court, I have prepared a rough diagram with no attempt toward proportion, but merely to illustrate the testimony of the libelant in this case.

Mr. Hoge: Your Honor, I understand that counsel had rested his case with the exception of medical testimony and further argument, if he desired further argument.

(Testimony of Theodore F. Bovich.)

The Court: Is this argument now?

Mr. Reynolds: No, your Honor, I merely wish to have the libelant illustrate his testimony on this exhibit so that it could be——

The Court: You are asking to reopen the case as far as that is concerned?

Mr. Reynolds: Yes, your Honor.

The Court: I can't see any good reason for that. I would like to have you point out to me some authority for such procedure.

Mr. Reynolds: Well, if it please the Court, I believe when we finished here the other day in the morning and we were to proceed in the afternoon——

The Court: Yes.

Mr. Reynolds: You stated that I might present anything additional at that time. [72]

Mr. Hoge: Additional argument.

The Court: This is by way of argument, apparently.

Mr. Reynolds: No, your Honor; there are several things that I wish to show.

The Court: Well, what do you wish to show?

Mr. Reynolds: Well, I wanted to show the exact location of the crates on board the ship, and where the libelant was working at the time that this accident occurred.

Mr. Hoge: That has been gone into in detail, your Honor, heretofore, the exact location.

The Court: Yes, it seems to me that that is true, Mr. Reynolds.

(Testimony of Theodore F. Bovich.)

Mr. Reynolds: Well, there was something additional that I wanted to show your Honor.

The Court: I know, but you cannot reopen your case. You have tried your case; you have submitted your case, as I understand, except for the testimony of doctors.

Mr. Reynolds: It wasn't my understanding that it had been submitted at that time, your Honor.

The Court: No, it was not finally submitted, but the testimony, as I understand it, on both sides, was all in except the testimony of a doctor that you wished to bring here. Isn't that so?

Mr. Reynolds: Yes, your Honor.

The Court: Well, I think that answers it. I do not think [73] I am going to permit you to reopen this case and re-examine this witness on matters that have already been touched upon and upon which testimony has already been quite fully given. If you want to make it a part of your argument, you may; but so far as reopening it to take additional testimony, no.

Mr. Reynolds: Well, I did not have any exhibit, so I was going to have the libelant mark this for the purpose of argument.

The Court: I do not know of any rule of procedure in the trial of a suit of this kind that would permit you to do that. You can point out to me, if you will, please, something that will support your position.

Mr. Reynolds: Very well, your Honor. I won't go into that.

(Testimony of Theodore F. Bovich.)

May I ask the libelant one question involving the medical that was overlooked, your Honor?

The Court: Go ahead.

Q. (Mr. Reynolds): Mr. Bovich, I believe you stated that you did not return to work until September of 1946? A. That is right, sir.

Q. What was the reason that you did not return to work before that time?

A. I had a pain in my leg all the time.

Q. And you were unable to work before that date because of your leg, is that correct?

A. Yes, sir.

Mr. Reynolds: I think that is all. [74]

Mr. Hoge: No questions.

The Court: Have you been working at all since?

A. Recently I have, sir.

Q. What have you been doing?

A. Acetylene burner.

Q. What? A. Acetylene burner.

Q. That was work you had done before you had been injured? A. Yes, sir.

Mr. Reynolds: That is all.

The Court: Are you working now?

A. Yes, sir.

Q. And are you working at the same wages you did before? A. Yes, sir.

The Court: I think that is all.

Mr. Reynolds: The libelant has no further evidence, your Honor.

Mr. Hoge: Your Honor, we are prepared to show by the testimony of a doctor that this man

(Testimony of Theodore F. Bovich.)

had a remarkably good recovery, a full, complete recovery; but the court indicated when the matter was argued the other day that it is questionable whether the court would want to hear medical testimony from the respondent in the case, so we will not do so, unless the court desires.

The Court: I do not see any reason for requesting it. I have heard the testimony of the medical expert for the libelant. I do not wish to hear any more on that score.

(Testimony closed.) [75]

The Court: Now, do you wish to argue this matter?

Mr. Reynolds: Well, I think about everything was gone into thoroughly at the last hearing, your Honor. There is nothing very much I could add.

The Court: I was wondering if there was anything you would wish to add in addition to——

Mr. Reynolds: I would like to call your Honor's attention to a case entitled *Porello vs. United States*, at 153 Federal (2d) 605. That was a case in which a large crate containing a truck was being lowered into the hold of a ship. The foreman for the stevedoring company who was directing the operations of the winch and the lowering of this truck into the hold, ordered the winch driver to raise it. In so doing he did not observe that there were some strongbacks and hatch covers covering the hatch, and the truck struck this strongback, knocked the hatch covers off, and injured this workingman who was working in the hold of the ship. In that case

the court held that that was negligence upon the part of the foreman for the stevedoring company.

There was also an additional question of negligence involved because there wasn't a lock on this strongback that fell, and the court held that it was concurrent negligence, that both the ship was liable and the stevedoring company was liable.

I think that that is a direct parallel with this particular case where the stevedores were loading this ship; they [76] did not strike the strongback, but they swung this crate over and struck the crate behind which this Mr. Bovich, this seaman, was working, and it is for that reason that I feel that that constitutes negligence for which he would have a right to recover.

In addition to that there is one other case, 1946 Am. Maritime Reports, at page 1222. This is a case in which a seaman was injured by the negligence of a winch driver who was a soldier in the United States Army forces at the time. It would be similar to this case.

We are suing the United States of America here, and in this case that I have just cited the court held that the soldier was an employee of the United States, and was performing a maritime duty at the time, and therefore that would not preclude any recovery upon the part of the libelant who was injured due to his negligence.

The Court: Of course, I think that is so. The question would be, was there negligence? The fact that he might have been working for the Govern-

ment might not preclude recovery for negligence, if there was negligence.

Mr. Hoge: That is what that case held.

Mr. Reynolds: That is true, your Honor.

The Court: The question is whether there was negligence. I have already indicated to you in some remarks I made the other day that I didn't think there was any negligence. [77] You have a different view about that. I, of course, cannot contain in my own mind all of the testimony that was given here upon that subject. I don't know whether you would want to look into the subject of having the reporter transcribe the testimony.

Mr. Reynolds: I have had it transcribed.

The Court: If you have I would like to have it.

Mr. Reynolds: Yes, your Honor.

The Court: I will go over it carefully and see if it is sufficient to change my mind in that regard. But that is the impression that I got, as I told you the other day, and I still have that impression very strongly, that there was no negligence; that no negligence had been proved.

Have you any other cases you wanted to call my attention to on the negligence proposition?

Mr. Reynolds: Those are the only two I had right on negligence; the others are general.

The Court: Then you let me have a transcript of the evidence and I will read those two cases on the question of negligence.

Now, if I should hold that there was negligence, what do you claim or what do you contend that the

court should give to this man in the way of damages? What is your idea about that?

Mr. Reynolds: I believe that he should be compensated for his loss of wages during that period of time; that he should receive something for his pain and suffering over this period [78] of approximately nineteen or twenty months, and there should be some allowance for future disability. At the time that he was injured he was making \$360 per month, plus his board and lodging. It has been stipulated here that his maintenance is worth \$3.50 a day, which would bring it to roughly around another hundred dollars a month.

The Court: I am not speaking about maintenance now; I am speaking about damages for negligence.

Mr. Reynolds: Yes, your Honor, but I am talking about what he was earning at the time.

The Court: Yes.

Mr. Reynolds: \$360 a month plus an allowance of approximately \$100 a month for board and room would bring his earnings at that time to about \$460 a month. He was off work from January of 1945 until September of 1946, which would make about 19 months.

Mr. Hoge: He was paid his wages up to March 23, 1945.

Mr. Reynolds: Which would come to approximately \$8700.

The Court: You heard what counsel just said?

Mr. Reynolds: Yes, your Honor, I am just getting to that. He was paid his wages that came to

about \$400 up until the end of the voyage, which should be subtracted from that amount, and he was also paid maintenance of about, I think, \$350.

The Court: Don't confuse maintenance with damages for negligence.

Mr. Reynolds: I was subtracting that from this total [79] amount, your Honor.

The Court: You say the respondents here are guilty of negligence.

Mr. Reynolds: Yes.

The Court: In the event that I should hold they were, what damages do you claim the libellant is entitled to for negligence—damages for negligence, not maintenance and cure?

Mr. Reynolds: Well, roughly, he lost about \$7500 in wages during that period of time. I think that he should receive an additional \$3000 for pain and suffering, and an additional allowance of \$3000 for pain and suffering and loss of earnings in the future.

The Court: You are claiming then \$6000, and I don't get that. Is that for pain and suffering that is past and pain and suffering in the future? Is that it?

Mr. Reynolds: And disability in the future; yes, your Honor.

The Court: What?

Mr. Reynolds: Pain and suffering and disability in the future.

The Court: You are asking for damages for negligence: Now, I am asking you, in the event that I should hold that there was negligence here and

the libelant is entitled to damages for negligence, what amount of damages are you asking the court [80] to give him?

Mr. Reynolds: Well, the way I have just figured it out, your Honor, the total would come to \$13,500.

The Court: That would mean, first, there would be wages, \$7500——

Mr. Reynolds: Yes, your Honor.

The Court: Pain and suffering \$3000, and then future pain and suffering \$3000.

Mr. Reynolds: Future pain and suffering, and I would like to add disability, your Honor, from the testimony of the doctor.

The Court: Well, I can't see that, at all. In the event that I should allow your client damages for negligence, I can't see that suggestion you make as to \$3000 for additional pain and suffering. You are reaching so far into the future that you don't know what is going to happen.

Mr. Reynolds: That is true, your Honor, but we do know that he does have a leg there that isn't sound, that is subject to future injury and ulceration.

The Court: That is problematical. It may be, he might have discomfort, and he might not. In these days of high class surgery, he may get along very fine without any trouble at all, and probably will have no more difficulty than a person would who had never had any injury whatsoever. He is bound to have the little pains in his legs and his ankles, and all [81] parts of his body that every human

being has. It is probable that it wouldn't be fair to attribute them to this accident.

All right; we have the negligence end of it.

Let us take the maintenance and cure. In the event that I should hold you not entitled to claimed damages for negligence and should hold you are entitled to maintenance and cure, how much do you claim you are entitled to?

Mr. Reynolds: The claim for maintenance from December, which was his last payment, until March 6th, I believe, is 77 days at \$3.50 per day. Now, that amount would be undisputed.

We also claim that he would be entitled to maintenance for a further period of time, until September, when he was able to return to work, at the same rate, \$3.50 per day.

The Court: Well, how many days in all?

Mr. Reynolds: I haven't counted that up, your Honor.

The Court: Well, won't you do it now?

Mr. Reynolds: If I had a calendar I could, yes.

The Court: The clerk will give you one.

Mr. Hoge: It would be nine months.

The Court: No. He first asked for 77 days.

Mr. Hoge: Yes.

The Court: You are including the entire time, aren't you?

Mr. Hoge: Well, he was paid his last maintenance December 18, 1945. That would be just nine months to the day, practically. [82] He returned to work in September.

Mr. Reynolds: Nine months, your Honor, then for the whole thing.

Mr. Hoge: 270 days.

The Court: All right. Anything further?

Mr. Reynolds: I think that is all, your Honor, unless you have something.

The Court: No. Will you let me have your transcript?

Mr. Reynolds: Yes, your Honor.

The Court: Counsel, do you have something to say?

Mr. Hoge: Yes, your Honor.

Of course, if the court were going to consider the allowance of damages, we would like to have the opportunity of placing on the stand an orthopedist to testify the man has had an excellent recovery and he is completely well.

The Court: That is before me.

Mr. Hoge: And he isn't suffering any disability at all at the present; he has had a remarkably fine result.

The Court: Yes.

Mr. Hoge: As the court indicated, I can't see where there is any negligence here. The only thing that counsel could do would be to rely upon the doctrine of *res ipso loquitur*, which certainly wouldn't apply in this case.

This man was asked to do a very simple thing. He was asked to take some empty cans and carry them somewhere, [83] plain, ordinary ash cans, just as if he had been asked to sweep the deck, and he wasn't told how to do it or where to go. We then

say that he just created a trap for himself here. They were loading crates on the starboard side of this ship. The whole port side of the ship was free from anything. They had booms going across, but the loading was on the very side of the ship that he started to carry the cans through, if your Honor will recall, and in the movement a crate was moved and squeezed him, or something happened. But he was walking through a little space there between two crates that had been loaded, large crates in a position that no one could possibly have seen him.

There is no proof that anyone in authority even knew he was there, and he hid himself in between there in the most dangerous position that he could possibly have been in. The evidence shows—and I have it right here; your Honor will find it in the transcript, page 24, the cross-examination of Kazem-Beck—the port side of that ship had nothing on it whatsoever. He had a number of feet wide open. And we all know when they are loading and unloading, the booms are not constantly going. They will wait until they can get a load attached to it, then on a signal given it is raised up and it is carried across and the load is put down, then they have got to detach that to make it ready for use again.

If your Honor please, as I said on the hearing, he could [84] have waited and had the whole port side of that ship, where he could have been seen by anyone giving orders, or tending hatch, or giving signals. And if he had been in a position with the boom moving across—and the man himself admits that

you are not supposed to walk under a moving boom—they would have stopped the gear. But here he hid himself in a position where his own witness, Kazem-Beck, said he didn't go in there where this man went because it was dangerous to go there. That is in Kazem-Beck's testimony. He stuck himself in there where they load cargo in that part of the ship and got squeezed. There is no negligence here. I can't see by any stretch of the imagination how counsel can figure that there is any negligence on the part of the ship. It is simply a trap that he has created for himself. He could have taken the port side of the ship and he would have been safe, would have been right out there in the open, and he could have waited until the booms were not moving and the thing would never have occurred. This isn't a case where we have to meet the doctrine of *res ipso liquitur*. They must prove some negligence here, which they have not done.

The Court: Very well. Submitted.

Leave it with me, Mr. Reynolds, the copy of the transcript.

The Clerk: I have it here, your Honor.

Mr. Hoge: The maintenance will amount to \$945, your Honor.

The Court: How much is that? [85]

Mr. Hoge: Maintenance, 270 days at \$3.50 a day. I am using 30 days to the month. It might be two or three days more than that.

The Court: All right. [86]

[Endorsed]: No. 11620. United States Circuit Court of Appeals for the Ninth Circuit. Theodore F. Bovich, Appellant, vs. United States of America, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed: May 6, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11620

THEODORE F. BOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

DESIGNATION OF PARTS OF RECORD TO
BE PRINTED AND POINTS RELIED ON

The Appellant, Theodore F. Bovich, hereby requests that the record be printed in its entirety. Appellant adopts as his points on appeal the assignment of errors appearing in the record.

Dated, San Francisco, May 9, 1947.

/s/ THEODORE F. BOVICH,
Appellant.

/s/ By ALBERT MICHELSON,
His Proctor.

Copy Received this 9th day of May, 1947.

/s/ FRANK J. HENNESSY,
Proctor for Respondent.

/s/ By JOHN H. BLACK,

/s/ EDW. R. RAY,

Proctors of Counsel for
Respondent.

[Endorsed]: Filed May 9, 1947.

No. 11,620

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

THEODORE F. BOVICH,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

ALBERT MICHELSON,

Russ Building, San Francisco,

Proctor for Appellant.

HERBERT CHAMBERLIN,

Russ Building San Francisco,

Of Counsel.

FILED

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Subject Index

	Page
Statement of jurisdiction	1
Statement of the case	2
Specification of assigned errors relied upon	6
Argument of the case	6
Summary of Argument	6
1. The District Court erred in denying libelant recovery under his first cause of action based on the Jones Act	7
2. The findings of the District Court that the respondent was not negligent, are clearly erroneous	12
3. The findings of the District Court that libelant's in- juries were caused solely by his own negligence, are clearly erroneous	15
4. The findings of the District Court that libelant did not suffer damages by reason of respondent's negligence, are clearly erroneous	16
5. Appellant is entitled to a decree awarding him appro- priate damages on his first cause of action based on the Jones Act	17
Conclusion	18

Table of Authorities Cited

Cases	Pages
Amit v. Loveland, 3 Cir., 115 F2d 308	11
Darlington v. National Bulk Carriers, 2 Cir., 157 F2d 817	11
DeWitt v. United States, D.C.Wash., 67 F. Supp. 61.....	12
Holm v. Cities Service Transp. Co., 2 Cir., 60 F2d 721....	11
Matson Navigation Co. v. Hansen, 132 F2d 487	8
Misjulius v. U. S. S. B. E. F. Corp., 2 Cir., 33 F2d 284.....	11
Reskin v. Minnesota etc. Co., 2 Cir., 107 F2d 743	11
Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265	11
Storgard v. France & Canada S. S. Corp., 2 Cir., 263 F. 545	11
Tampa Interocean S. S. Co. v. Jorgensen, 5 Cir., 93 F2d 927	11
United States v. Boykin, 2 Cir., 49 F2d 762	11
United States S. B. E. F. Corp. v. O'Shea, 5 F2d 123	9

Statutes

Jones Act (46 U.S.C.A., sec. 688).....	1, 7, 18
Judicial Code, amended, Section 128 (28 U.S.C.A., sec. 225)	2
Public Law 17 (50 U.S.C.A. Appx., sec. 1291).....	1
Suits in Admiralty Act (46 U.S.C.A., secs. 741-752).....	1
28 U.S.C.A.,sec. 41(3)	2
28 U.S.C.A., sec. 230	2

No. 11,620

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THEODORE F. BOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

The appeal is by the libelant Theodore F. Bovich, in a seaman's action, from a final decree dismissing the first cause of action in his libel.

STATEMENT OF JURISDICTION.

The libel contained two causes of action. (A 4-10.) The first cause of action (A 4-8) was based on the Jones Act (46 U.S.C.A., sec. 688), made applicable to employees on United States vessels by Public Law 17 (50 U.S.C.A. Appx., sec. 1291), and enforceable against the United States under the Suits in Admiralty Act (46 U.S.C.A., secs. 741-752). The second cause of action was based on general admiralty law

for maintenance. (A 8-9.) The District Court had jurisdiction. (28 U.S.C.A., sec. 41 (3).) Final decree was entered in the District Court on March 11, 1947. (A 25.) An order allowing appeal was entered April 28, 1947. (A 27.) The appeal was timely. (28 U.S.C.A., sec. 230.) Jurisdiction of this court to review the final decree of the District Court is therefore sustained by section 128 of the Judicial Code, amended. (28 U.S.C.A., sec. 225.)

STATEMENT OF THE CASE.

The first cause of action in the libel alleged that on January 3, 1945, libelant received personal injuries in the course of his employment as an able-bodied seaman on respondent's steamship Charles J. Colden while the vessel was loading at Oro Bay, New Guinea. (A 47.) Negligence was ascribed to respondent in loading and in ordering libelant to work at a dangerous place under dangerous conditions with resulting injury. (A 5-6.) Damages in the sum of \$25,000 were sought. (A 7.) Due presentation of a claim and disallowance thereof were alleged. (A 7.) The second cause of action sought maintenance on allegations that the injuries had totally disabled libelant since January 3, 1945, and that a balance of \$1793.75 was unpaid. (A 8-9.) Suit was filed March 18, 1946. (A 10.)

Respondent's answer admitted ownership and operation of the vessel, the employment of libelant and injury in the course of employment, and presentation

and disallowance of claim. (A 11-12.) Negligence and damages were denied. (A 11-12.) Liability at the rate of \$3.50 per day for maintenance was conceded. (A 13-14.)

The testimony at the trial was undisputed and consisted of the examination and cross-examination of witnesses produced by libelant. No witnesses were produced by the respondent.

At the time of the accident on January 3, 1945, the steamship Charles J. Colden was moored port side to the dock at Oro Bay, New Guinea. (A 40-41.) About 8 o'clock of that morning a garbage scow had come to the starboard side of the vessel, and after garbage had been dumped into the scow the vessel's empty garbage cans were left on the starboard side just aft of No. 4 Hatch. (A 47, 56.) There were about 12 of these cans. (A 43.) Each can was about 3 to 3½ feet high and 2½ feet in diameter. (A 46.)

Around 9 o'clock of the same morning libelant and one Kazem-Beck, another able-bodied seaman, were working forward of the midships house "up at No. 1 Hatch". (A 42, 65-66.) They were ordered by the boatswain "to go back aft to No. 4 hatch" and move the empty garbage cans "forward next to the deck house" on the starboard side, a distance of 50 to 60 feet. (A 42-43, 47.) At the time this order was given loading operations were being conducted at No. 4 Hatch (A 43) by army-stevedores operating from the port side of the vessel (A 58). Libelant and Kazem-Beck immediately obeyed the order. (A 43.) The

boatswain did not accompany them. (A 43.) When they got back to No. 4 Hatch they found that two large crates containing "either a tractor or a tank, or something of that sort" had been loaded "on the starboard side of No. 4 Hatch". (A 44.) Each was about "12 feet long by 7 feet high, by about 8 feet wide". (A 44.) "They were located on the starboard side of the ship, about between a foot and a half and two feet from the taffrail or top of the bulwark, and were about three feet from each other". (A 45.) One of the crates was about 3 feet over the hatch. (A 58.) There were two possible ways to move the garbage cans—one was the outside passage, that is, between one of the crates and the starboard taffrail—the other was the inside passage—that is, between the two crates. (A 45-46.) Libelant and Kazem-Beck first used the outside passage. The result was disastrous. Kazem-Beck testified: "There was one possible way to carry them which was on the outside, about a two or two and one-half foot space between the taffrail and the first box. I tried to do it, but the ship had a starboard list, the taffrail was slippery, because of the garbage that had been dumped over. When I tried to, I slipped and fell, the garbage can fell overboard, and I had a bad bruise on the inside of my thigh." (A 47.) Libelant was following Kazem-Beck and saw what happened when the outside passage was used. He then used the inside passage. Again the result was disastrous. He testified: "Well, he took the first can, sir. Then I followed him with another one. As he slipped and fell, I still was coming in back of him

with mine, my can, and I put it down, and he sat down to look at his leg. So I went back to get another can, and came through this passageway. I got in there and they had lifted another box onto the boom. They were swinging one over and hit this box on No. 4 Hatch, causing it to come over and hit my leg, caught my leg between the can and the box.” A 68-69.) As to the accident to libelant, Kazem-Beck gave this testimony: “Well, the trouble was caused by the fact that there were only two possible ways of carrying these garbage cans, either the way I tried first, which was not successful because I slipped and fell, and the second way was the way Mr. Bovich tried, between the two boxes. There was about a three-foot space in between. So he was dragging an empty garbage can behind him. * * * I saw Mr. Bovich start to drag the can. He was backing up, dragging the garbage can behind him, and what happened is this, that he went through where the Army stevedores, when they were placing the next big wooden box with what we call heavy winches, approximately two tons, they hit the adjacent box, the adjacent box moved, and jammed his leg against the garbage can, which, in turn, was jammed against the next box and crushed his leg”. (A 48-49.)

The trial court, although accepting the testimony of libelant and Kazem-Beck at par, was of the opinion that negligence on the part of respondent was not shown. (A 14-17.) It made findings against libelant on the issues of negligence and damages (A 18-22), but found that libelant was entitled to maintenance

in the sum of \$945. (A 20-23.) It entered a decree dismissing the first cause of action in the libel, and awarding maintenance in the sum of \$945 on the second cause of action. (A 25.)

The appeal is concerned with the first cause of action. In this connection it is the position of appellant that the findings against him are clearly erroneous and that he is entitled to a decree awarding him damages.

SPECIFICATION OF ASSIGNED ERRORS RELIED UPON.

Appellant relies upon each of his assigned errors, namely, No. (1) to No. (14), both inclusive. (A 28-32.)

ARGUMENT OF THE CASE.

Summary of Argument.

The order of the boatswain was clearly negligent. No necessity existed for ordering the seamen to move the garbage cans while loading operations were in progress. By the order of the boatswain appellant was needlessly required to work in a dangerous place and under dangerous conditions. The libelant was bound to obey the order of the boatswain, even though the order required him to work under unsafe conditions, and he did not assume the risks of such obedience. When the seamen were required to work under unsafe conditions disclosed by the circumstances of the case, the dictates of common prudence demanded

.

adequate supervision and direction of the work by the boatswain or some officer of the vessel in order that the seamen be safeguarded. None was furnished. Want of ordinary care on the part of appellee and its agents and employees was the sole proximate cause of appellant's injury. The District Court erred in denying libelant recovery under his first cause of action based on the Jones Act. Its findings that respondent was not negligent, are clearly erroneous. The same is true respecting its findings that libelant's injuries were caused solely by his own negligence, and its findings that libelant did not suffer damage by reason of respondent's negligence. An appeal in admiralty is a trial de novo, and this court should enter a decree awarding appellant appropriate damages on his said first cause of action.

1. THE DISTRICT COURT ERRED IN DENYING LIBELANT RECOVERY UNDER HIS FIRST CAUSE OF ACTION BASED ON THE JONES ACT.

Assignment of Error No. 1: "The court erred in dismissing the first cause of action in the libel." (A 28.)

Assignment of Error No. 2: "The court erred in decreeing that libelant take nothing by his first cause of action." (A 28.)

The order of the boatswain was clearly negligent under the circumstances of the case. He ordered appellant and Kazem-Beck, another able-bodied seaman, then working forward at No. 1 Hatch (A 42,

65-66), "to go back aft to No. 4 Hatch" and move the empty garbage cans "forward next to the deck house" on the starboard side, a distance of 50 to 60 feet (A 42-43, 47). Loading operations were then being conducted at No. 4 Hatch (A 43) by army-stevedores operating from the port side of the vessel (A 58). No necessity existed for ordering the seamen to move the garbage cans while loading operations were in progress. (A 52.) Two cans were available to the steward's department on the port. After appellant was injured no cans were moved until loading operations were over. (A 52.)

The order of the boatswain is therefore properly characterized as needless and inopportune and one that unnecessarily placed in jeopardy the safety of those to whom it was given. It was an order of the type considered by this court in *Matson Navigation Co. v. Hansen*, 132 F2d 487, where it was said, at pages 488 and 489:

(488) "The complaint invokes the provisions of the Jones Act, 46 U.S.C.A., sec. 688, and the question is whether the place in which appellee was required to work was reasonably safe in the circumstances existing at the time. Obviously, the test of reasonable safety varies with the prevailing conditions. No liability flows from requiring a sailor to perform his necessary sailor's duties with the ship rolling and lurching in a heavy storm, even though he may be injured from a fall caused by a wave sweeping across the deck. Yet the owner would be liable if, instead of performing some necessary duty, he were injured when sent by the mate across the same

wave swept deck to rescue the ship's cat. The test is whether the requirement is one which a reasonably prudent superior would order under the circumstances. *American Pacific Whaling Co. v. Kristensen*, 9 Cir., 93 F2d 17.

(489) "Appellant claims that while at sea it was customary to employ the sailors in the operating of raising the cargo booms from their deck fastenings to a position alongside the mast, to have them ready to discharge cargo at Honolulu, and that it was proper to employ appellee in such customary manner. However, the custom does not cover the case of such working of the crew after a storm has so disarranged the deck cargo, which is also made slippery by grease. There was no need so to raise the boom in a rolling sea and the operation could have waited the smooth waters of Honolulu harbor."

And the same type of order was considered by the Court of Appeals for the District of Columbia in *United States S. B. E. F. Corp. v. O'Shea*, 5 F2d 123, where it was said, at page 125:

(125) "The appellant furthermore contends that the evidence in the case failed to sustain the charge of negligence upon the part of the officers of the vessel. That contention must be overruled upon the facts appearing in the record; for the officers did not exercise reasonable care for the plaintiff's safety, when they required him to perform the work in question under the circumstances disclosed by the evidence. It is conceded that a ship's officers made be justified under given circumstances in ordering seamen into positions of great personal peril in the performance

of their duty, but no such circumstances existed in this case. Neither the safety of the vessel nor the preservation of the cargo required that the oil should be cleaned up while the ship was at sea in such weather, nor was the oil then needed for the operation of the ship. The plaintiff in fact was needlessly exposed to obvious danger of great bodily harm by the imperative command of the ship's officers; this was negligence upon the part of the officers, and the plaintiff's injury was the direct result of it."

By the order of the boatswain appellant was needlessly required to work in a dangerous place and under dangerous conditions. On the port side, cargo was being worked by the army-stevedores. (A 58.) On the port side, booms, tacks, riggings, and heavy crates were moving overhead. It is perhaps unnecessary to mention to this court that one of the elementary and obvious precautions for seamen is "Never walk on the side of the vessel on which cargo is being worked." On the starboard side, two heavy crates, 12 feet long, 7 feet high, 8 feet wide, had been loaded at No. 4 Hatch. (A 44.) The space between the starboard taffrail and the nearest crate was about 2 feet. (A 45.) The space between the two crates was about 3 feet. (A 45.) In obeying the order of the boatswain and moving the garbage cans forward the seamen had the alternative of using the outside passage between the taffrail and the crate or the inside passage between the two crates. That it was dangerous to use the outside passage was demonstrated by what happened when the seamen used it. Injury to Kazem-

Beck resulted. That it was dangerous to use the inside passage was demonstrated by what happened when appellant used it. Serious injury to appellant resulted. While he was dragging a garbage can between the two crates in a space 3 feet wide and 8 feet long and with the crates towering above him so that he could not see what was going on, the army-stevedores loaded another crate near No. 4 Hatch in such fashion that it hit and moved one of the other crates, thereby contracting the space through which appellant was passing and causing his leg to be crushed against the garbage can he was dragging.

The libelant was bound to obey the order of the boatswain, even though the order required him to work under unsafe conditions, and he did not assume the risks of such obedience. (*Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 430-433, 59 S.Ct. 262, 266-267, 83 L.Ed. 265; *Darlington v. National Bulk Carriers*, 2 Cir., 157 F2d 817, 819; *Amit v. Loveland*, 3 Cir., 115 F2d 308, 311; *Reskin v. Minnesota etc. Co.*, 2 Cir., 107 F2d 743, 745; *Tampa Interocean S. S. Co. v. Jorgensen*, 5 Cir., 93 F2d 927, 929; *Holm v. Cities Service Transp. Co.*, 2 Cir., 60 F2d 721, 722; *United States v. Boykin*, 2 Cir., 49 F2d 762, 763; *Misjulis v. U. S. S. B. E. F. Corp.*, 2 Cir., 31 F2d 284; *Storgard v. France & Canada S. S. Corp.*, 2 Cir., 263 F. 545.)

When the seamen were required to work under the unsafe conditions disclosed by the circumstances of the case, the dictates of common prudence demanded adequate supervision and direction of the work by the boatswain or some officer of the vessel in order that

the seamen be safeguarded. None was furnished. (A 43.)

The conclusion is therefore irresistible that want of ordinary care on the part of appellee and its agents and employees was the sole proximate cause of appellant's injury. In this connection it is to be noted, moreover, that appellee must be held responsible to appellant for the negligence of the army-stevedores who, equally with appellant at the time of his injury, were in the maritime service of the appellee. (*DeWitt v. United States*, D.C.Wash., 67 F.Supp. 61, 62.)

The facts here are undisputed, and on the facts and the law it follows that the District Court erred in denying libellant recovery under his first cause of action based on the Jones Act.

2. THE FINDINGS OF THE DISTRICT COURT THAT THE RESPONDENT WAS NOT NEGLIGENT, ARE CLEARLY ERRONEOUS.

Assignment of Error No. 3: "The court erred in finding that it is not true that on or about the 3rd day of January, 1945, or at any other time while respondent was engaged in loading the vessel SS 'Charles J. Colden,' said respondent negligently or in any other manner failed to have any licensed or other officer overseeing or supervising said loading of said vessel." (A 28-29.)

Assignment of Error No. 4: "The court erred in finding that it is not true that on or about the 3rd day of January, 1945, or at any other

time while respondent was engaged in loading said vessel, said bos'n negligently ordered libelant to carry a garbage can on said main deck between large, heavy crates thereon, and that it is not true that at said time there was no clear, open, or safe passage on said deck through which libelant could carry said garbage can without danger of being injured." (A 29.)

Assignment of Error No. 5: "The court erred in finding that no negligent order of any kind was given by said bos'n or any other person to said libelant; that with full knowledge on the part of libelant of the existence and availability of a safe, clear and unobstructed route and passageway through which he should have and could have carried said garbage can, he deliberately and entirely at his own volition and selection chose and used an obviously dangerous route and passageway in the carrying of said garbage can." (A 29.)

Assignment of Error No. 6: "The court erred in finding that it is not true that on or about the 3rd day of January, 1945, or at any other time, respondent, while engaged in loading said vessel, negligently failed to have a clear, open and safe passageway for libelant to carry out any orders given him; and that it is not true that at said time and place, in obedience to any negligent order, libelant was carrying said garbage can along the deck of said vessel between two crates, or that respondent negligently caused or permitted a large crate being loaded on said deck and being carried by ship's gear to negligently strike against another crate, thereby causing last-mentioned crate to strike against and to crush

or injure libelant. And the court erred in finding that it is true that there was a clear, open and safe passageway for libelant's use as aforesaid, and that any movement of said crates was a normal and reasonably to be expected consequence of proper and careful operation of ship's gear in such loading operations, all of which was and should have been known to libelant." (A 29-30.)

Assignment of Error No. 7: "The court erred in finding that libelant was not caused to suffer any injuries as the result of negligence of any kind of respondent." (A 30.)

That the findings challenged by the foregoing assignments were clearly erroneous has been demonstrated by the review of the evidence earlier made in this brief.

It cannot be disputed in this case that the boatswain needlessly and inopportunately ordered appellant to move the garbage cans on the starboard side of the vessel at a time when loading operations endangering his safety in doing such work were in progress. The order was therefore negligent. The findings to the contrary are clearly erroneous.

Nor can it be disputed in this case that at the time appellant was injured cargo was being worked on the port side of the vessel. Therefore the port side of the ship did not furnish a safe place or passageway for moving the garbage cans forward in obedience to the boatswain's negligent order. On the contrary, reason would counsel a seaman in obeying the negligent order of the boatswain under such circumstances

that the use of the starboard side of the vessel even though obstructed by the standing crates would furnish a greater measure of safety than the use of the port side. The use of the starboard side would have undoubtedly furnished a full measure of safety and prevented injury to appellant if the boatswain or some officer of the vessel had supervised or directed the moving of the garbage cans during loading operations, or if the appellee had established and maintained any sort of coordination between those working for it in their various activities. The appellee did not discharge its duties in such respects. Therefore, the appellee was negligent. The findings to the contrary are clearly erroneous. The evidence is susceptible to but one reasonable conclusion and that is that the negligence of appellee proximately caused the appellant's injuries.

3. THE FINDINGS OF THE DISTRICT COURT THAT LIBELANT'S INJURIES WERE CAUSED SOLELY BY HIS OWN NEGLIGENCE, ARE CLEARLY ERRONEOUS.

Assignment of Error No. 8: "The court erred in finding that it is true that libelant was negligent in carrying out his duties in that he failed to exercise ordinary prudence or care in passing between the crates on board the main deck of the vessel when he knew other crates were being swung into position on said main deck and that some shifting of crates was usual and to be reasonably expected." (A 30-31.)

Assignment or Error No. 11: "The court erred in finding that injuries sustained by libelant

while in the employ of said vessel were due solely to his own negligence.” (A 31.)

The law is plain that libelant was bound to obey the order of the boatswain, even though the order required him to work under unsafe conditions, and he did not assume the risks of such obedience. He was injured while obeying the negligent order of the boatswain and while working under the unsafe conditions for which respondent was responsible. The fault causing injury was therefore the fault of the respondent and not that of the libelant. The findings to the contrary are clearly erroneous.

4. THE FINDINGS OF THE DISTRICT COURT THAT LIBELANT DID NOT SUFFER DAMAGES BY REASON OF RESPONDENT’S NEGLIGENCE, ARE CLEARLY ERRONEOUS.

Assignment of Error No. 9: “The court erred in finding that it is not true that libelant suffered or incurred general damages in the sum of \$25,000, or any other sum or sums or otherwise or at all.” (A 31.)

Assignment of Error No. 10: “The court erred in finding that it is not true that libelant suffered, incurred or contracted personal injury or loss of wages or earnings due to any carelessness or negligence on the part of any agent, servant, officer or employee of the said vessel, SS ‘Charles J. Colden,’ or respondent, United States of America.” (A 31.)

The libel alleged that libelant’s injuries consisted of “a compound fracture of his right tibia and right

ankle, punctured arteries of said leg, damage to the nerves of said leg and ankle, and great nervous shock.” (A 6.) It alleged that at the time he was injured on January 3, 1945, he was earning approximately \$400 monthly. It alleged inability to work or earn money since the accident. (A 7.) The libel was filed March 18, 1945. (A 10.) Trial was had on October 4, 1946. (A 35.) Medical testimony at the trial confirmed the allegations of the libel respecting injuries and disclosed permanent injuries. (A 101-106.) Libelant testified that his leg still bothered him. (A 78-79.) He was unable to work until September, 1946, and lost about 19 months wages. (A 114.) This approximated about \$7500 in lost wages. (A 115.)

Since the negligence of the respondent is plain on the present record, the findings of the court here under challenge are plainly erroneous.

5. **APPELLANT IS ENTITLED TO A DECREE AWARDING HIM APPROPRIATE DAMAGES ON HIS FIRST CAUSE OF ACTION BASED ON THE JONES ACT.**

Assignment of Error No. 12: “The court erred in failing to find and hold that libelant was entitled to recover damages for personal injuries sustained by libelant aboard the SS ‘Charles J. Colden’.” (A 31.)

Assignment of Error No. 13: “The court erred in failing to find and hold that libelant had sustained the burden of proof of the allegations contained in the first cause of libel.” (A 31-32.)

Assignment of Error No. 14: "The court erred in finding and holding that libelant was entitled to recover on his second cause of action only."
(A 32.)

Enough has been said to demonstrate the error of the District Court in failing to make such award. As an appeal in admiralty is a trial de novo and the record is plain and plenary a decree should be entered by this court awarding libelant appropriate damages on his first cause of action based on the Jones Act.

CONCLUSION.

Appellant therefore respectfully submits that the decree of the District Court dismissing the first cause of action in the libel should be reversed, and a decree entered awarding the libelant and appellant appropriate damages on the said first cause of action.

Dated, San Francisco,
July 1, 1947.

ALBERT MICHELSON,
Proctor for Appellant.

HERBERT CHAMBERLIN,
Of Counsel.

No. 11,620

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THEODORE F. BOVICH,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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Subject Index

	Page
Statement of pleadings and jurisdiction	1
Statement of the case	2
Argument	12
The court did not err in denying the appellant recovery for damages	15
Conclusion	19

Table of Authorities Cited

Cases	Pages
Armit v. Loveland, 115 Fed. (2d) 308	5
Bradey v. United States, 1945 A.M.C. 777	9, 10
Darlington v. National Bulk Carriers, 157 Fed. (2d) 817..	5
DeWitt v. United States, 67 Fed. Supp. 61	8, 11
Dobson v. United States (C.C.A. 2nd), 27 Fed. (2d) 807..	9
Hardie v. New York Harbor Dry Dock Corporation (C.C.A. 2nd), 9 Fed. (2d) 545	16
Holm v. Cities Service Transportation Co., 60 Fed. (2d) 721.....	6, 17
Johnson v. United States (C.C.A. 2nd), 74 Fed. (2d) 703..	15
Lynch, Admx. v. United States of America, 1947 A.M.C. 780.....	19
Matson Navigation Co. v. Hansen, 132 Fed. (2d) 487.....	7
McArthur v. The King (1943), 3 D.L.R. 225	10
Misjulis v. United States Shipping Board, 31 Fed. (2d) 284	6
Reskin v. Minnesota Transit Co., 107 Fed. (2d) 743.....	5
Seas Shipping v. Ward (C.C.A. 9th), 22 Fed. (2d) 251....	18
Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424	5
Standard Oil Company of California v. United States (C.C.A. 9th), 153 Fed. (2d) 958	8
Storgard v. France & Canada S. S. Corp., 263 Fed. 545...	6
Tampa Interocean S. S. Co. v. Jorgensen, 93 Fed. (2d) 927.....	6, 7, 17
The Nacoochee, 275 Fed. 876	17
United States v. Boykin, 49 Fed. (2d) 762.....	6
United States S. B. E. F. Corp. v. O'Shea, 5 Fed. (2d) 123	7

No. 11,620

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THEODORE F. BOVICH,

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BRIEF FOR APPELLEE.

STATEMENT OF PLEADINGS AND JURISDICTION.

The libel is couched in two causes of action, the first cause of action being one for damages and the second cause of action being one for maintenance and cure. Appellee having heretofore deposited in the registry of the Court the sum of \$945.00 in satisfaction of the decree, this Court need not be concerned with the second cause of action. We shall, therefore, direct our comments to the first cause of action alone.

This cause was plead and tried on three theories of negligence, viz.: (1) a negligent order, (2) the failure to provide a safe place in which to work, (3) negligence in the operation of the ship's gear being employed in loading.

The answer denied all allegations of negligence and affirmatively plead that the loading operations were being conducted by the United States Army (Ap. 13).

If liability for damages as a result of negligence of the United States Army or its enlisted personnel is to be saddled upon this appellee, jurisdiction lies only under the *Federal Tort Claims Act* (28 U.S.C. 921, et seq.), which became effective August 2, 1946, and by its terms applied retroactively as to any causes of action which arose subsequent to January 1, 1945. It is the contention of appellee that in order to charge the United States of America for the alleged negligence of the United States Army or its personnel that jurisdiction exists only under the provisions of the Federal Tort Claims Act.

STATEMENT OF THE CASE.

In addition to the facts set forth in appellant's statement of the case, appellee points out that at the time appellant was instructed to move the empty garbage cans to a forward position on the vessel that he knew the United States Army was working at the number four hatch, and at that time the port side of the vessel's deck was entirely clear and unobstructed (Ap. 58). As to these facts witness Kazem-Beck testified (Ap. 58):

“Q. You knew the Army stevedores were loading that ship, didn't you?

A. Oh, yes, sir, I did know it.

Q. You knew they were bringing in these crates?

A. Yes, I did.

Q. On the port side of the ship it was absolutely clear? Nothing was between the hatch and the bulwark?

A. Nothing except the stevedores loading the ship from the port side.

Q. It was absolutely clear, was it not?

A. That is right.

Q. Now, these cans were relatively light, weren't they? They were galvanized iron cans?

A. Correct, light cans, yes, sir.

Q. You could take them in your hands and lift them up?

A. Yes, you could.

Q. And when you were told to carry these cans forward, why, you were not told the way to carry them, what was to do it, what aisles to take?

A. No, we were not.

Q. You were just told to move the cans to some other part of the ship?

A. Correct, sir."

Witness Kazem-Beck also testified as follows (Ap. 62 to 63):

"Q. When you say the booms were on the port side, you mean the gear was over on that side?

A. That is right, sir.

Q. But the aisleway, as you testified, that 18-foot space, was clear, was it not?

A. The 18-foot space?

Q. Yes.

A. It was clear except for the two boxes standing on it.

Q. I mean the port side, not the starboard.

A. No boxes on the port side, no.

Q. As you testified before, that was clear, wasn't it?

A. It was clear, yes."

It was the starboard side of the deck on which the crates were being loaded and where the accident happened.

The appellant and the witness Kazem-Beck were not ordered to move the garbage cans in any particular way or over any particular route; they were merely instructed to move them from aft to amidship. The path to be traversed and manner of moving the cans were left to their judgment and discretion (Ap. 42-43).

The appellant himself testified (Ap. 85):

"Q. And, as you testified, I believe, and your witness here, you received orders to take these empty garbage cans and carry them to some part of the ship there?

A. Yes, sir.

Q. You were not told how to do it, by what route to go, were you?

A. No, sir."

The loading operations which appellant charges were negligently conducted were being performed entirely by United States Army. The appellant himself testified in this connection (Ap. 83):

"Q. Mr. Bovich, this loading operation that was being performed at the time, was being done by the Army stevedores, was it not?

A. Yes, sir.

Q. And the Army stevedores were handling the winches, and, of course, handling the loading and unloading gear of the ship?

A. As far as I know, sir."

Appellant cites a number of cases on page 11 of his brief as contending for the proposition that appellant is bound to obey an order even though the order required him to work under unsafe conditions. None of the cases cited are in any way pertinent and we will devote only a few words to each.

In the case of *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424, involved defective appliances, viz.: a broken step.

Darlington v. National Bulk Carriers, 157 Fed. (2d) 817, concerned the use of a defective and unsafe paint spray which the injured seaman was ordered to use over his protest.

Armit v. Loveland, 115 Fed. (2d) 308, involved the failure of the shipowner to provide required splash-plates in the engine room after having been requested to do so by the injured. Because of the lack of such plates, the seaman was injured.

Reskin v. Minnesota Transit Co., 107 Fed. (2d) 743, involved a direct order to do a specific act in a specific way. The injured in that case was instructed to climb a vertical ladder with two shovels in his hand, leaving only one hand free, with the result that he fell from the ladder and was injured.

The cases of *Tampa Interocean S. S. Co. v. Jorgensen*, 93 Fed. (2d) 927, and *Holm v. Cities Service Transportation Co.*, 60 Fed. (2d) 721, cited by appellants, are cases which we believe uphold appellee's position herein and will be discussed along with other cases cited herein by appellee.

In *United States v. Boykin*, 49 Fed. (2d) 762, the Court found liability where a seaman was washed overboard as a result of the respondent's failure to properly navigate the vessel in a storm while the seaman was working on deck under specific orders.

The case of *Misjulis v. United States Shipping Board*, 31 Fed. (2d) 284, involved the use of defective rope that the injured seaman objected to using. In reply to his protest as to the insufficiency of the rope, the vessel's bos'n informed the injured seaman that the rope would not break and proceeded to haul the injured seaman aloft and before he could get out of the chair the rope broke causing the injured seaman to fall to the deck.

In the case of *Storgard v. France & Canada S. S. Corp.*, 263 Fed. 545, the Court held that the owners were under an obligation to provide a seaworthy ship and were bound to furnish the ship's equipment, including an allegedly worn and defective bolt in a seaworthy condition.

It will be noted that none of the foregoing cases relied upon by the appellant is in any way factually comparable nor do they assert any law with which we are concerned, save and except those of *Holm v. Cities Service Transportation Co.* and *Tampa Inter-*

ocean S. S. Co. v. Jorgensen (supra), which will be referred to hereinafter.

The order given in the case of *Matson Navigation Co. v. Hansen*, 132 Fed. (2d) 487, was not even remotely comparable to the instructions given here. In the *Hansen* case the vessel was at sea and in rough weather; the vessel was rolling, and Hansen was instructed to proceed on deck where it was necessary for him to climb on some steel beams which had previously been oil soaked, making the work unreasonably dangerous under the circumstances. In the *Hansen* case the injured seaman had no choice of methods or routes; he was under direct and specific orders and did not of his own volition place himself in a position of an obvious and known danger. The case is not even remotely in point.

In the case of *United States S. B. E. F. Corp. v. O'Shea*, 5 Fed. (2d) 123, the plaintiff was required to do certain obviously dangerous work on deck when the vessel was exposed to heavy seas which he protested and told the Captain that "It was impossible for any man to work down there without being killed from gas or killed by slipping as the vessel was beginning to roll * * *." He also told the mate that he could not put them on (manhole covers) because, "If he let go the lifeline he would get killed" and "that the oil was far down in the tank, so that it was not necessary to put the plates on and it was a dangerous job". To which the mate replied that he knew it but the Captain ordered them on. As in the case of *Matson Navigation Co. v. Hansen*, supra, O'Shea had no

measure of freedom of action but was compelled under penalties to obey the orders of his officers in a specific way and at a specific time and place.

Appellant relies on the case of *DeWitt v. United States*, 67 Fed. Supp. 61, and urges that appellee must be held responsible to appellant for the negligence of the United States Army which he characterizes equally with appellant at the time of his injuries as being in the maritime service of appellee. We believe such an interpretation of the *DeWitt* case farfetched. The *DeWitt* case involved injuries suffered after the termination of hostilities where such was not the fact in the instant matter. We frankly believe the holding in the *DeWitt* case to be erroneous and we can find no authorities where the subject has been decided by an Appellate Court. In order to impose liability for alleged negligence of the United States Army, its personnel must, of course, be shown to be fellow servants of the appellant.

This Court has previously spoken with respect to the differences between civilian fellow servants and the relationship of a soldier to his Government.

In the case of *Standard Oil Company of California v. United States*, 153 Fed. (2d) 958 (C.C.A. 9), at page 961:

“* * * There are, it is granted, some resemblances between the master-servant and government-soldier relationships, but the distinguishing features are so great that we do not feel that the legislature intended the words ‘servant’ and ‘master’ in Paragraph 45 (c) to include within

their meaning the words 'soldier' and 'government'.

In modern times the freedom of an employee to enter into and to terminate a contract of employment might be said to be a major distinguishing factor between the two relationships. Labor's many other rights and privileges recognized today serve to distinguish even further the position of the modern employee from that of the soldier. Even in peace time a soldier who enlists is subject to many strict duties and disciplines which are never impressed on the ordinary employee. See e.g. Articles 58 and 61 of the Articles of War, 10 U.S.C.A. §§ 1530, 1533. But whatever the picture in peace, in times of national emergency it is the duty of the citizen to serve in the protection of his country and every citizen is a potential soldier under the conscription laws * * *

Thus the fact that this soldier (Etzel) had entered the Army under the draft for the duration of the war emergency makes the position of the soldier even less comparable to that of an employee. The trial judge ably points out the distinctions between soldier and employee at 60 F. Supp. 810. See also *McArthur v. The King (Canada)* (1943), Ex. C. R. 77 (1943), 3 D. L. R. 225."

A member of the United States Navy is not considered an employee of the United States within the scope of the Suits in Admiralty Act.

Dobson v. United States, 27 Fed. (2d) 807 (C.C.A. 2nd);

Bradey v. United States, 1945 A.M.C. 777.

In the *Bradey* case, a member of the United States Navy was injured in a collision between a United States naval vessel and another vessel which was owned by the United States of America and operated under the familiar form of general agency agreement.

The Court states:

“Whether the ‘Morton’ be deemed a public vessel or merchant vessel, recognition of any right of a libellant to sue the United States of America for damages for decedent’s injury or death even when caused by fault of another ship than decedent’s is forbidden by the public policy stated in *Dobson v. United States*, 27 Fed. (2d) 807.”

The Court in *McArthur v. The King* (1943), 3 D.L.R. 225 (Exchequer Court of Canada), after an exhaustive search of the authorities, concluded that the sovereign was not liable for the act of a member of the Armed Forces while on duty. This authority was cited in *Standard Oil Company v. United States*, *supra*. The Court said on pages 260, 261:

“There is nothing to indicate in any way that the legislature go beyond the application of the doctrine of employer’s liability to the crown in the field of negligence, or that it meant to include within the scope of the doctrine persons of a class or kind to whom the doctrine as it is ordinarily understood could not apply. * * * Before the Crown shall be held responsible for the negligence of such persons to whom the doctrine of employer’s liability as understood as between subject and subject, would not apply, and where the relationship of the parties is so different from that of

master and servant, or employer and employee, it will require language in the statute of the clearest and most explicit kind. Any such far-reaching extension of the liability of the Crown would have to be stated in the statute in express terms.”

In the *DeWitt* case the Court held that the mere fact that the winch driver also served contemporaneously as a member of the Armed Forces would not defeat libelant’s right to indemnity from the vessel. The Court reasoned that the soldier winch driver was serving in a dual capacity as a member of the ship’s company and also contemporaneously as a member of the Armed Forces. The Court further goes on to say:

“In considering and ascertaining whether or not the winch driver at the time, place and environment of the accident was engaged with the injured oiler in maritime duties within the meaning of the broad protective provisions of the statutes applicable to this libel, it should be noted that no wartime activities were then being performed by either. The work of each was essentially a post-war maritime service, not dissimilar in character to the duties performed by the injured man and the stevedore, respectively discussed by the Supreme Court in *International Stevedoring Company v. Haverty*, 272 U. S. 50, 1926 A.M.C. 1638.”

It may be noted with interest that the *DeWitt* case was decided July 30, 1946, two days before the effective date of the Federal Tort Claims Act which retroactively applied to all the causes of actions aris-

ing subsequent to January 1, 1945 and applies to the instant cause. The Federal Tort Claims Act clearly gives a right of suit against the United States to appellant Bovich where one did not previously exist. Indeed, had it ever been conceived that the United States could be sued for such torts as is now claimed by appellant, there would have been no necessity for the Federal Tort Claims Act. Had Judge McCormick been advised of the existence of this consent to sue statute, he most certainly would have been saved the mental wrestling that was required to produce his opinion.

ARGUMENT.

The appellant argues that the appellee was required to work under unsafe conditions and that the dictates of common prudence demanded adequate supervision and direction of the work by some officer of the vessel. We believe that any seaman above a moron should not require any supervision to know how to safely carry a light, empty, garbage can on and along the deck of a vessel. The facts of this case are that appellant chose to carry this light-weight object by dragging it along the deck while walking backward between two seven-foot-high cases. He thus effectively concealed his presence from the operators of the vessel's gear, and by walking backward completely eliminated any possibility of his seeing or knowing what was occurring in the course of the vessel's loading operations into which he backed. In this connection, the appellant, Bovich, testified (Ap. 69):

“Q. (by Mr. Reynolds). Where was the can at the time the box pushed over against you?

A. It was between my leg.

Q. Which way were you facing?

A. I was going backwards.

Q. Backwards, and did you have the can above the deck?

A. Well, it was above the deck, yes, sir.

Q. Were you carrying it or dragging it?

A. Dragging it.

Q. You were backing up, dragging this can?

A. Yes, sir.

Q. And were between the two crates?

A. Yes.”

We believe it elementary that a man crossing the deck of a vessel during the course of the loading of one of the hatches should be required at least to look forward when walking in the direction of the loading operations. This recklessness on the part of appellant can be compared only to the actions of a completely blindfolded seaman wandering around the vessel's deck during the course of loading operations. This was done at the exact time when a heavy case was being landed on the starboard deck of the vessel along which he had elected to proceed. The port side of the vessel was entirely clear and empty, it being some eighteen feet in width. Had a load been in motion across the port side of the deck appellant would have only had to wait a few seconds for the passing of the load in order to traverse the entire length of the deck in complete safety. This is the obvious route which any one even remotely concerned with his own safety

would have taken. He also had a choice of passage between the taffrail and the first box which was claimed to be slippery, but the mere fact that appellant's witness previously slipped while traversing this passageway does not necessarily constitute proof that appellant would likewise have slipped. It is obvious that appellant chose the most dangerous possible way of performing this simple task. He chose the only unsafe route and walked backwards and out of sight, when there was no necessity of any kind therefor.

At the risk of being repetitious, we again point out that appellant was not under any specific order as to the path or route to be followed nor the means to be employed. He had complete freedom of choice and made no objection of any kind to the instructions given to him by the bos'n. It is nothing short of ridiculous to state that the order to move the garbage cans placed in jeopardy the safety of the libelant. The mere fact that loading operations are being conducted at one of the vessel's hatches does not mean that all ship's business in the time of war must cease, particularly, when the order could have well been carried out in complete safety by using the clear port side of the deck and without danger to the libelant as was here the case. We respectfully suggest to this Court that an order to move a dozen light, empty, ordinary-sized garbage cans is not in itself a dangerous order. What made the task dangerous was the method employed by the appellant in fulfilling it.

THE COURT DID NOT ERR IN DENYING THE APPELLANT
RECOVERY FOR DAMAGES.

We believe there is no question but that appellant here had a choice of routes, one safe and one unsafe and he chose the latter. This situation has been before the Courts on several occasions and the authorities clearly hold that where the seaman chooses the unsafe route he is precluded from a recovery.

The case of *Johnson v. United States* (2 C.C.A.) 74 Fed. (2d) 703, involved a three-island type vessel with wells in between. The crew were quartered in the poop, while the messhall was in the midship house. During heavy weather the deceased seaman instead of traversing a route that was open to him below deck through the shaft alley elected to cross the vessel's well deck, and in so crossing he was washed overboard. The Circuit Court in reversing the lower Court, dismissed the libel:

“A seaman to whom two ways were available, one dangerous and the other safe, assumed whatever risk was involved in taking the dangerous course when he selected it through his personal choice and not because of any compulsion or ignorance of the situation. To find him negligent in crossing the well deck, as the trial judge did, and at the same time to hold that he did not assume the risk of such an obviously unsafe passage, was quite contrary to the whole doctrine of assumption of risk applicable to such cases and explained in our recent decision in *Holm v. Cities Service Transportation Co.*, 60 F. (2d) 721, where the very question we have here arose. Accordingly, the libel should have been dismissed

unless the libelant was able to show that the respondent failed to take proper steps to rescue the seaman after he was washed overboard.”

In the case of *Hardie v. New York Harbor Dry Dock Corporation* (C.C.A. 2), 9 Fed. (2d) 545, the deceased had two routes open to him, one obviously safe and the other of doubtful or unknown safety. The Court in affirming a judgment denying a recovery held:

HAND, Circuit Judge (after stating the facts).

“(1) We cannot see that the defendant failed to furnish the intestate with a safe way to his work. The route over the bridge deck was certainly such, and it was obviously open to those who did not care to use the dark route over the main deck between door and door. Two of the intestate’s fellows had used it before him, and it was a compliance with the master’s duty to furnish a safe way. If there be two ways, one safe and the other dangerous, the servant chooses the dangerous way at his peril, if the difference is known to him. *Beulah Coal Co. v. Verburgh*, 292 F. 34 (C.C.A. 8); *Williams Cooperage Co. v. Headrick*, 159 F. 680, C.C.A. 548 (C.C.A. 8); *The Indrani*, 101 F. 596, 41 C.C.A. 511 (C.C.A. 4.)

(2) It seems to us beyond any fair difference of opinion that the intestate knew the safe way and the possible dangers of the other.”

The Court made the further pertinent observation at page 547:

“He knew and he chose; the defendant was not at fault for that choice.”

In *Tampa InterOcean S. S. Co. v. Jorgensen*, 93 Fed. (2d) 927, at 930 (cited by appellant), the Court, we think, properly held the following instruction to be the law:

“You are instructed that if the plaintiff was furnished two methods of entering ’tween deck space, one obviously safe and the other obviously unsafe and *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method, the defendant is not liable.”

We agree with the holding laid down in *Holm v. Cities Service Transportation Co.*, 60 Fed. (2d) 721 at 723 (cited by appellant), wherein the Court held:

“Where the conduct of the injured seaman, however, is induced only by his own free will, and he acts to his injury at a time and place when he is free to choose between doing what is safe and what is known to him to be dangerous, he is obviously under no more compulsion than is an employee on land * * *. So a seaman off duty who has gone for a drink of water and decides to return to his room over a deck he knows is slippery and may have oil collected in pools upon it, when he knows there is a safe though somewhat longer way for him to return, must be held to have assumed the known and obvious risks incident to his voluntary choice. The judgment should have been only for so much as the plaintiff was entitled to recover in his action for maintenance and cure.”

Another case while involving slightly different facts is *The Nacoochee*, 275 Fed. 876. The libellant was ordered by the vessel's mate to oil the steering engine, which was located in a small room under the

pilot house. While he was doing so, the vessel gave a lurch and he was thrown off his balance and injured. The negligence charged was the failure to have the room properly lighted and ordering the libellant to do work for which he was not fitted. The Court in denying libellant's recovery stated:

“The order to oil the engine was not negligence, unless it required the libellant to do something which was so dangerous and for which he was so ill-equipped that injury to him from obedience was likely to result, which was plainly not this case.”

This Court in *Seas Shipping v. Ward* (C.C.A. 9), 22 Fed. (2d) 251, at page 252 stated:

“For these reasons, we can see no escape from the conclusion that the working place was reasonably safe, considering the nature and purpose of the employment in which the appellee was at the time engaged, and that the accident was attributable solely and only to inattention on his part and to his failure to exercise reasonable and ordinary care for his own protection and safety.”

We believe this instant case is clearly within the rule of *Seas Shipping v. Ward*, supra. As we have heretofore shown, this appellant's injury was clearly the result of his own free choice of a dangerous route and inattention on his part to his duties and in the lack of exercise of reasonable or ordinary care for his own protection and safety.

A case similar to that at bar is that of *Lynch, Admx. v. United States of America*, 1947 A.M.C.

780. The libelant chose a dark route and fell through an open hatch cover, whereas a lighted safe route was available to him. The Court in concluding its opinion states:

“The Court is satisfied that the accident occurred not through the fault of the Bethlehem Steel Company, but the unfortunate choice by the libelant’s intestate of an unsafe means of egress rather than the lighted passageway provided by his employer and of which he had knowledge. *Hardie v. New York Harbor Dry Dock Corp.*, 1926 A.M.C. 75, 9 F. (2d) 454.

The libel must be dismissed.”

CONCLUSION.

It having been conclusively shown that appellant’s injuries as suffered resulted directly and proximately from his own negligence and lack of ordinary, or any care, in the preservation of his own safety it is respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco,
September 29, 1947.

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No. 11,620

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

THEODORE F. BOVICH,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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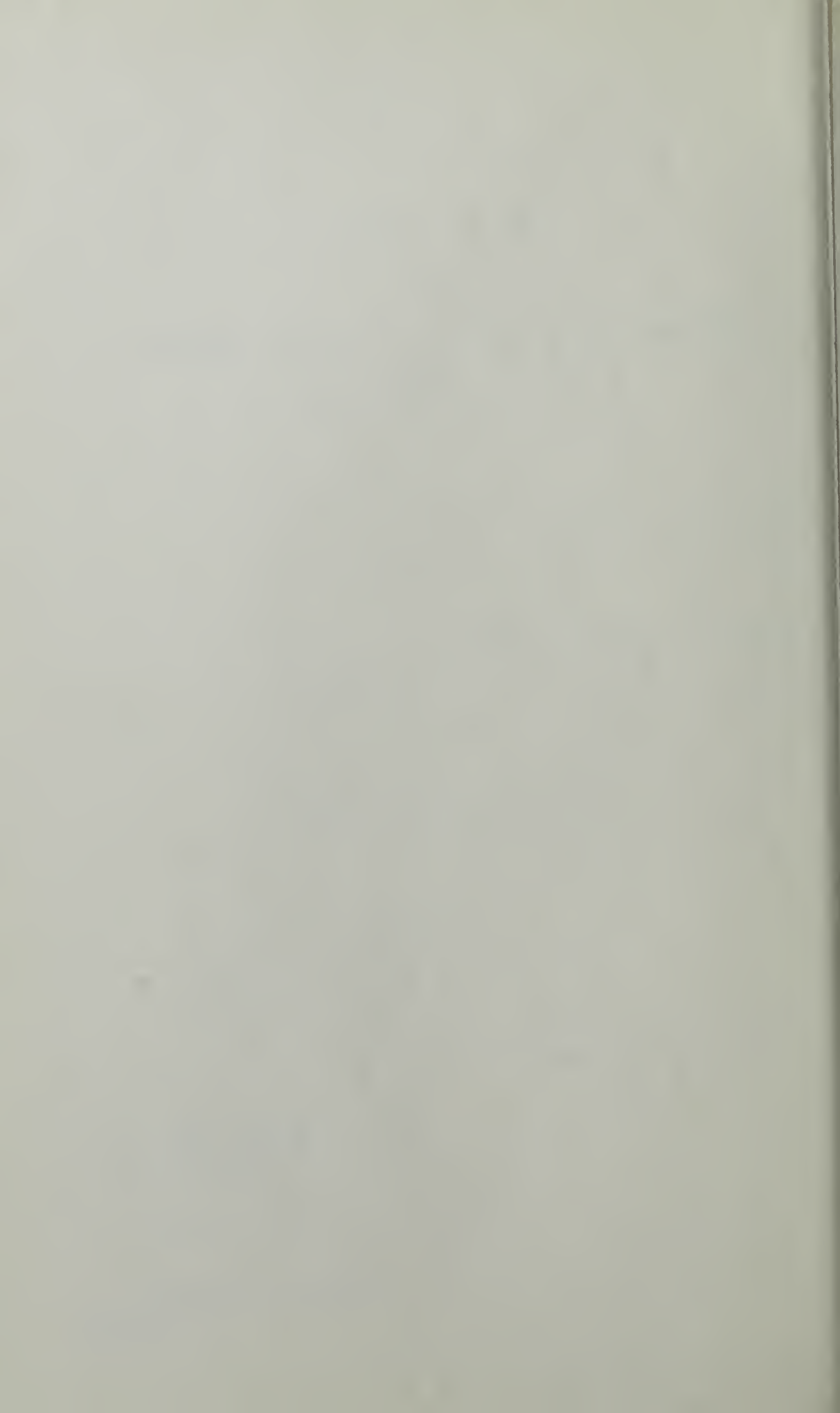
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OCT 10 1947

PAUL P. O'BRIEN,
CLERK



Subject Index

	Page
The District Court erred in denying libelant recovery under his first cause of action based on the Jones Act.....	1
Conclusion	9

Table of Authorities Cited

Cases	Page
American Stevedores v. Porello, 67 S.Ct. 847.....	2
Brady v. United States, D.C.N.Y., 1945 A.M.C. 777.....	4
DeWitt v. United States, 67 F. Supp. 61.....	3
Dobson v. United States, 2 Cir., 27 F2d 807.....	4
Hardie v. New York etc. Corp., 2 Cir., 9 F2d 545.....	7
Holm v. Cities Service Transp. Co., 2 Cir., 60 F2d 721....	7
Johnson v. United States, 2 Cir., 74 F2d 703.....	7
Lopoczyk v. Chester A. Poling, Inc., 2 Cir., 152 F2d 457..	2
Lynch v. United States, D.C.N.Y., 1947 A.M.C. 780.....	8
Mahnich v. Southern S.S. Co., 321 U. S. 96, 64 S.Ct. 455, 88 L.Ed. 561	2
Rey v. Colonial Nav. Co., 2 Cir., 116 F2d 580.....	4
Seas Shipping Co., Inc. v. Sieraeki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, 1946 A.M.C. 698.....	2
Seas Shipping Co. v. Ward, 9 Cir., 22 F2d 251.....	8
Standard Oil Co. v. United States, 153 F2d 958.....	3
Sundberg v. Washington F. & O. Co., 9 Cir., 138 F2d 801	2
Tampa InterOcean S.S. Co. v. Jorgensen, 5 Cir., 93 F2d 927	7
The Nacoochee, D.C. Mass., 275 F. 876.....	8

Statutes

California Civil Code, section 49(e)	3
28 U.S.C.A., sec. 943(d)	2
45 U.S.C.A., sec. 51	4
46 U.S.C.A., sec. 688	1
46 U.S.C.A., secs. 741-752	2
46 U.S.C.A., sec. 781	4
50 U.S.C.A. App., sec. 1291	2

No. 11,620

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THEODORE F. BOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

THE DISTRICT COURT ERRED IN DENYING LIBELANT RECOVERY UNDER HIS FIRST CAUSE OF ACTION BASED ON THE JONES ACT.

The libel alleged (A 4-5) and the answer admitted (A 11) that appellant was injured in the course of his employment while working as an able-bodied seaman on a merchant vessel owned and operated by the appellee. The proximate cause of the injury was ascribed in the libel (A 5-6): (1) To a negligent order of the boatswain of the vessel; (2) To a negligent failure of the appellee to furnish libelant with a safe place to work; (3) To negligent loading of the vessel.

Appellant's right to maintain an action based upon the Jones Act to recover damages for his injury is therefore plain. (46 U.S.C.A., sec. 688.) And equally

plain is appellant's right to enforce his cause of action under the Suits in Admiralty Act. (46 U.S.C.A., secs. 741-752; 50 U.S.C.A. Appx. sec. 1291.) A claim of such character is specifically exempted from the provisions of the Federal Tort Claims Act which appellee invokes in its brief. (28 U.S.C.A., sec. 943 (d); *American Stevedores v. Porello*, 67 S.Ct. 847, 851.)

It was admitted at the trial (A 38) and established by the evidence (A 58, 83) that Army stevedores were handling the winches and loading the vessel at the time appellant was injured. This situation prompts the appellee to contend in its brief (p. 8) that "In order to impose liability for alleged negligence of the United States Army, its personnel must, of course, be shown to be fellow servants of the appellant". The contention is unsound. The scope of the Jones Act is not limited to negligence of fellow servants. (*Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 458, 88 L.Ed. 561.) It extends to the negligence of the employer, the negligence of the officers of the employer, *the negligence of the agents of the employer*, and the negligence of the employees of the employer. (*Lopoczyk v. Chester A. Poling, Inc.*, 2 Cir., 152 F2d 457, 459; *Sundberg v. Washington F. & O. Co.*, 9 Cir., 138 F2d 801, 803.)

In the ordinary case it is well settled that a stevedore working on a vessel in navigable waters is a seaman, and an employee, within the meaning of the Jones Act. (*Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, 1946 A.M.C. 698.) But the appellee asserts that this is not the ordinary

case. They point out that here the stevedores were soldiers. They point to the decision of this court in *Standard Oil Co. v. United States*, 153 F2d 958, where it was held that the government is not a "master" and a soldier is not a "servant" within the meaning of section 49 (c) of the California Civil Code. That decision was in no way concerned with maritime law. Nor is it opposed to Judge McCormick's decision in *DeWitt v. United States*, 67 F. Supp. 61, where, in holding the government liable under maritime law for injury to a seaman on a merchant vessel caused by the negligence of a soldier-stevedore, he said at page 62:

"We do not believe it necessary to characterize the soldier-winch driver of an 'employee' of the United States in order to make secure to the injured seaman the salutary provisions of the statutes created for his benefit. The relationship which existed between the winch driver and the respondents at the time of the injury to libelant, as shown by the depositions before us, places both men in the maritime service of respondents, and renders them both responsible for the injuries sustained by the libelant. *Hust v. Moore-McCormack Lines, Inc.*, 66 S.Ct. 1218, 1946 A.M.C. 727; see, also, *United States v. Marine*, 4 Cir., 155 F2d 456, 1946 A.M.C. 775."

Since it is obvious that the soldier-stevedores in the present case were at least "agents" of the appellee in the work they were performing at the time appellant was injured in the course of his employment as a seaman, it follows that his right of action under the Jones Act is plain. Moreover, the Federal Employers' Lia-

bility Act (45 U.S.C.A., sec. 51), incorporated into the Jones Act, makes the shipowner liable for injury “resulting in whole or in part from the negligence of any of the officers, agents, or employees, . . . or by reason of any defect or insufficiency, due to its negligence, in its . . . appliances, machinery, . . . or other equipment”. The doctrine of concurring negligence would therefore implicate the appellee regardless of whatever conclusion might be reached as to its responsibility for the negligence of soldier-stevedores. (*Rey v. Colonial Nav. Co.*, 2 Cir., 116 F2d 580, 583.)

At page 9 of its brief the appellee cites the cases of *Dobson v. United States*, 2 Cir., 27 F2d 807, and *Bradey v. United States*, D.C.N.Y., 1945 A.M.C. 777. They are not helpful. Each involved a claim by a member of the United States Navy under the Public Vessels Act. (46 U.S.C.A., sec. 781.) Each held that the Act was not available to navy men. That Act is in no way involved in this case, for as earlier pointed out the libel alleged and the answer admitted that the libelant was a seaman on a merchant vessel.

Turning to the question of negligence, the position of the appellee is that it was without fault and that appellant was wholly to blame for his own injury. The appellee has not denied that at the time of injury the appellant was complying with a mandatory order of the boatswain to go aft and move forward certain garbage cans then on the starboard side of the vessel. The appellee has not denied that the order was not prompted by any urgency or necessity requiring immediate moving of the garbage cans. The appellee has

not denied that at the time the order was given and at the time it was being executed cargo was being worked on the port side of the vessel, and that the passageway on the starboard side forward from the garbage cans was partly obstructed with cargo and partly strewn with garbage spilled from the cans when they had been emptied into the garbage barge earlier on the morning of the accident.

What is therefore apparent is that the order of the boatswain was inopportune and unnecessary, and that its inevitable effect was to require appellant to work in an unsafe place exposed to dangerous conditions from which injury might result. The appellee disputes this and argues that it furnished appellant with a safe place to work and a safe passageway forward because the deck on the port side of the vessel was unobstructed and could have been used by appellant. But it is a matter of common knowledge, and the evidence so shows (A 61-62), that a fundamental rule of safety drilled into the minds of all seamen is "Never walk on the side of the vessel on which cargo is being worked". Had the appellant violated this fundamental rule of safety with resulting injury, the appellee would have undoubtedly been more emphatic in terming appellant a "moron" and a "blindfolded seaman". (pp. 12-13.) It is reasonable to suppose that when the boatswain gave his inopportune and unnecessary order he knew that the seamen to whom the order was given would not violate the fundamental rule of safety mentioned. The evidence is plain that the appellant did not violate it. (A 83.) It was reasonable for the ap-

pellant to suppose that the passageway was left open between the large crates on the starboard side of the vessel in order that seamen could go between them. The opening was clearly an invitation for seamen to use such passageway. A seaman could not be expected to assume that if he accepted the invitation and used such passageway his employer would cause or permit the passageway to be closed or partly closed while he was passing through it in the course of his employment.

The situation here is not one in which a seaman in disobedience to the orders of his superior or with full knowledge of the danger deliberately selects a dangerous way when a safe way is open to him. Here we have a situation where only ways of danger were open to appellant because of the negligent, inopportune, and unnecessary order of the boatswain. The way he selected was not more dangerous than the way he rejected. If the way he selected became the more dangerous way it was because of events occurring after he selected the way and was passing through it, and it became the way of danger only because of additional negligence on the part of his employer. It is idle for appellee to contend that it could not be expected to stop all loading operations merely because two seamen were ordered to move a few garbage cans a few feet forward. The answer is that the boatswain should not have given his negligent, inopportune, and unnecessary order to move the garbage cans while loading operations jeopardizing the safety of the sea-

man were in progress. Under settled law cited in the opening brief (pp. 8-11) it follows that appellant did not assume the risk of obedience to the boatswain's order, and it would be contrary to law to say that appellee was without fault and that appellant was wholly to blame for his own injury.

The position of appellee is not supported by the cases cited in its brief. In *Johnson v. United States*, 2 Cir., 74 F2d 703, cited at page 15, a seaman was washed overboard during monsoon weather while crossing the exposed well deck. He was not obeying any orders of his superiors. On the contrary, he was disobeying their general admonitions not to go over the open deck but to use a shaft tunnel in such rough weather as existed at the time of accident. The case furnishes no parallel. In *Hardie v. New York etc. Corp.*, 2 Cir., 9 F2d 545, the action was by a ship repairer against his employer. In going to his work two ways were open to him—one dark and one lighted. His fellow-employees used the way of light and were uninjured. He used the way of darkness and was injured. The case was not in admiralty. The case of *Tampa Interocean S.S. Co. v. Jorgensen*, 5 Cir., 93 F2d 927, cited at page 17, is authority for appellant. In complying with an order of a boatswain Jorgensen selected a way which he did not know was unsafe when he selected it. In affirming a judgment in Jorgensen's favor the court held that the boatswain's order was negligent. In *Holm v. Cities Service Transp. Co.*, 2 Cir., 60 F2d 721, the seaman was not obeying an

order of his superiors when injured. In *The Nacoochee*, D.C. Mass., 275 F. 876, the charge of negligence was that the first mate ordered the quartermaster to do work for which he was not fitted. The court merely held that the evidence showed that the quartermaster was well fitted to do such work. In *Seas Shipping Co. v. Ward*, 9 Cir., 22 F2d 251, cited at page 18, a longshoreman was ordered by the mate to remove a hatch cover. The existence of a hole under the cover was open and apparent. The longshoreman nevertheless fell into the hole while removing the cover. The case was clearly one of nonliability and offers no parallel to the present case. In *Lynch v. United States*, D.C. N.Y., 1947 A.M.C. 780, 783, cited at pages 18 and 19, an electrician's helper on a night shift was sent aboard a ship with a repair gang. He fell through an open hatch cover, while passing from his place of work to the gangway. There was an illuminated passageway around the hatch, and he chose to cross the hatch where there was no light. The holding of the court was that the libelant had been provided with a safe place to work and that he fell into the open hatch because of his own contributory negligence. The case offers no parallel. It may be mentioned that the decision was appealed and is still pending and undetermined in the Circuit Court of Appeals.

CONCLUSION.

Appellant therefore again respectfully submits that the decree of the District Court dismissing the first cause of action in the libel should be reversed, and a decree entered awarding the libelant and appellant appropriate damages on the said first cause of action.

Dated, San Francisco,

October 8, 1947.

ALBERT MICHELSON,

Proctor for Appellant.

HERBERT CHAMBERLIN,

Of Counsel.



No. 11621.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GROVER J. ELLIS,

Appellant,

vs.

AMERICAN HAWAIIAN STEAMSHIP COMPANY, a corpor-
ation,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

JUN - 7 1947

PAUL H. O'BRIEN



TOPICAL INDEX

	PAGE
Jurisdictional statement	1
Statement of the case.....	3
Assignment of errors.....	6
Argument	7

I.

This appeal is a trial de novo.....	7
-------------------------------------	---

II.

Is a seaman within the scope and course of his employment during the period of time he is using facilities maintained some eight miles from the harbor exclusively for the recreation of members of our merchant marine, during a period of time he was warned to go no other place for recreation while ashore?	7
--	---

III.

Is it wilful misconduct upon the part of a seaman to use facilities provided for him by the United Seaman's Service Club, when they are used in the accepted manner?.....	9
---	---

IV.

Is an injured seaman entitled to receive the costs of his repatriation to the point of shipment, when injured during the voyage for which he was employed and which required hospitalization until after the voyage terminated?.....	11
Conclusion	12
Appendix :	

Assignments of errors.....	App. p. 1
----------------------------	-----------

TABLE OF AUTHORITIES CITED

CASES	PAGE
Aguilar v. Standard Oil Co., 318 U. S. 724, 87 L. Ed. 1107, 1943 A. M. C. 451.....	7, 10
Allen v. S. S. Hawaiian, 53 F. Supp. 985.....	11
Centennial, The, 10 Fed. 397.....	11
Miller v. United States, 51 F. Supp. 924.....	11
Moss v. Alaska Packers Ass'n, 70 Cal. App. (2d) 857, 1945 A. M. C. 493.....	8
Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 83 L. Ed. 424, 1939 A. M. C. 1.....	8
Sundberg v. Washington Fish & Oyster Co., 138 F. (2d) 801....	10
Taylor v. United Fruit Company, 1947 A. M. C. 165.....	8
William Penn, The, 1925 A. M. C. 1316.....	11

STATUTES

Act of Congress of September 24, 1789, Chap. 20, Secs. 9, 11, 1 Stats. at L. 76 (28 U. S. C. A., Sec. 371).....	3
Judicial Code, Sec. 128a, 56 Stat. at L. 272 (28 U. S. C. A., Sec. 225)	3

No. 11621.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GROVER J. ELLIS,

Appellant,

vs.

AMERICAN HAWAIIAN STEAMSHIP COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a final decree of Dismissal entered by the United States District Court for the Southern District of California, Central Division, in an action for maintenance and cure and wages, arising out of injuries sustained by Grover J. Ellis, third assistant engineer on the S. S. "Cape Saunders," August 7, 1945, at Manila, P. I., while appellant was on shore leave at the United Seamans Service Club.

The pleadings in the District Court were a Libel *In Personam* for Wages, Maintenance and Repatriation [Ap. 3.] Answer of American Hawaiian Steamship Company. [Ap. 7.]

A trial was had before the United States District Court, with the Honorable Peirson M. Hall, judge presiding. After hearing the evidence, oral and depositions, together with other written documents, proctors for libellant and respondent argued the case. The Honorable Judge then found in favor of the respondent and entered a Decree of Dismissal.

Findings of Facts and Conclusions of Law were signed and filed on March 3, 1947. [Ap. 15.] Proposed Amendments to the Findings of Fact and Conclusions of Law having been filed on February 27, 1947. [Ap. 13.]

Final Decree was entered on March 3, 1947. [Ap. 20.]

The Apostles on Appeal, certified by the Clerk of the District Court, include the following: Petition for Order Allowing Appeal Without Bond, and Points and Authorities [Ap. 22]; Assignment of Errors [Ap. 24]; Order Allowing Appeal Without Furnishing Bond or Costs [Ap. 29]; Notice of Appeal [Ap. 30]; and *Praecipe* [Ap. 31]. An order extending time of filing Apostles on Appeal was filed April 29, 1947. [Ap. 33.]

The jurisdiction of the District Court over actions, civil and maritime, involving claims for wages, maintenance and cure, arises from Article III, Sections 1 and 2 of the United States Constitution, which provides that the judicial power of the United States shall be vested in the Supreme Court and such inferior courts as Congress may establish, and that such power shall extend to all civil causes of admiralty and maritime jurisdiction.

Jurisdiction of civil causes of admiralty and maritime jurisdiction was vested in the courts of the United States by the Act of Congress of September 24, 1789, Chapter 20, Sections 9, 11; 1 Stat. L. 76, 78; 28 U. S. C. A., Section 371.

Appeals from final decrees in admiralty are authorized by Section 128a of the Judicial Code, as amended May 9, 1942 (56 Stat. L. 272, 28 U. S. C. A., Sec. 225), providing that the Circuit Court of Appeals shall have appellate jurisdiction to review, by appeal, final decisions.

Statement of the Case.

The facts are practically undisputed. On August 11, 1945, the appellant was employed on the S.S. "Cape Saunders," as third assistant engineer, at Los Angeles, California, for a voyage not to exceed 12 months. His base pay was \$202.00 per month, room and board, and overtime. [Ap. 53, 54.]

On October 4, 1945, the S.S. "Cape Saunders" was anchored in Manila Bay. About 12 o'clock, noon, the appellant, with the first assistant engineer, left the "Cape Saunders" on shore leave. [Ap. 41, 42.] Appellant, with the first assistant, left his ship for the United Seamen's Service Club after seeing a notice on the bulletin board of the vessel that this club was the only place a seaman could go for recreational purposes. [Ap. 41, 121.]

Appellant and the first assistant engineer hitch-hiked to the Club, a distance of about eight to ten miles. [Ap. 41, 60, 61.]

After having been at the United Service Seamans Club about an hour and one-half, during which time appellant and Mr. Stone, the first assistant, drank some beer, appellant and Mr. Stone rented bathing suits from the United Seamans Service Club and went swimming in the swimming pool maintained at the Club. [Ap. 42, 43.]

Both Mr. Stone and appellant were diving from the springboard in the pool, although the pool was not completely full, nor were there signs indicating that the pool should not be used, nor were they advised that they should not use the pool. [Ap. 43, 48.]

After appellant had followed the first assistant Stone in making several dives from the springboard in the swimming pool, appellant struck his head a glancing blow on the bottom of the pool, and sustained a fractured vertebrae. [Ap. 43, 39, 40.]

Appellant was immediately hospitalized, and repatriated to San Francisco on November 18, 1945. [Ap. 44, 45.] He was hospitalized in the Marine Hospital at San Francisco from November 18, 1945, to January 6, 1946. [Ap. 39.] On January 28, 1946, appellant was admitted to outpatient care in the United States Public Health Service at Los Angeles, California, and so remained at December 6, 1946. [Ap. 40.] However, appellant returned to remunerative employment on October 1, 1946. [Ap. 45.]

It was stipulated by the parties that had the appellant remained on the Cape Saunders until the termination of

its voyage, appellant would have earned \$464.60 as base pay. [Ap. 36.] The voyage terminated on December 13, 1945. [Ap. 54.] It was further stipulated that the reasonable cost of repatriation of the appellant from San Francisco to Los Angeles, the point of shipment, was \$20.00. [Ap. 36.]

War Shipping Administration Operations Regulation No. 108, provided that licensed personnel shall be paid maintenance of not less than \$4.00 or more than \$6.50 per day. [Ap. 86.]

The S.S. "Cape Saunders" was owned by the United States and operated by and through the War Shipping Administration, with the American Hawaiian Steamship Company, the General Agents in the operation of the vessel. [Ap. 73, 74.]

The District Court found that Grover J. Ellis was employed as the third assistant engineer at base pay of \$202.00 per month, for the voyage in question of the S.S. "Cape Saunders." That he sustained certain injuries when diving in the swimming pool of the Seaman's Club in Manila, October 4, 1945. The Court further found that the injuries so sustained were the result of libelant's wilful misconduct and were sustained outside the scope and course of his employment. [Ap. 14-18.]

The District Court further found that libelant incurred expenses in the sum of \$20.00 for his repatriation to Los Angeles, from the San Francisco Marine Hospital. [Ap. 18.]

From the Findings of Facts, the Court concluded that the libelant was entitled to recover nothing.

Assignment of Errors.

The assignment of errors upon which the appellant relies are set forth in the Appendix to this brief, and are summarized in the following statement of points involved in this appeal:

1. Is a seaman within the scope and course of his employment during the period of time he is using facilities maintained some eight miles from the harbor exclusively for the recreation of members of our Merchant Marine, during a period he was on shore leave, and was warned by his employer to go no other place for recreation while ashore?

2. Is it wilful misconduct upon the part of a seaman to use the facilities provided for him by the United Seaman's Service Club, when they are used in the accepted manner?

3. Is an injured seaman entitled to receive the costs of his repatriation to the point of his shipment when injured during the voyage for which he was employed and which required hospitalization until after the voyage terminated?

ARGUMENT.

I.

This Appeal Is a Trial de Novo.

Citation of authority in the Ninth Circuit is no longer necessary upon this point.

II.

Is a Seaman Within the Scope and Course of His Employment During the Period of Time He Is Using Facilities Maintained Some Eight Miles From the Harbor Exclusively for the Recreation of Members of Our Merchant Marine, During a Period of Time He Was Warned to Go No Other Place for Recreation While Ashore?

This point has been given considerable attention by our courts, commencing with the case of *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 87 L. ed. 1107, 1943 A.M.C. 451. While in one of the cases then before the Court, the injured seaman was half a mile from his vessel, it was held that he was entitled to his maintenance although struck by an automobile while the injured seaman was upon personal business. In this case the Court reasoned as follows:

“To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seamen hazards encountered only by reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are ‘exclusively personal’ and have no relation to the vessel’s business. Men cannot live for long cooped up aboard ship without substantial impairment of their efficiency, if not also serious danger to discip-

line. * * * In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely personal diversion."

This same reasoning was followed by Judge Murphy in *Moss v. Alaska Packers Ass'n.*, 70 Cal. App. (2d) 857, 1945 A.M.C. 493. In this case, Moss, the Deck Engineer on the S.S. "Homer Lee" was ashore on leave at Hobart, Tasmania. After having had five drinks of straight scotch whiskey at a bar at Hobart, he was struck on the head by persons unknown. He required hospitalization in Tasmania and was separated from his ship by reason of his injuries. He was repatriated to the United States and instituted an action for wages, transportation, maintenance and cure, after leaving the S.S. "Homer Lee." In short, almost identical to the case at bar. The Court held that the philosophy of the *Aguilar* case, *supra*, was sound, and that the seaman was entitled to so recover his wages, transportation, maintenance and cure.

Likewise, the Municipal Court of the City of New York, in *Taylor v. United Fruit Company*, 1947 A.M.C. 165, held that a stand-by seaman who was injured in the street near his home while on his way there for the week-end, was entitled to recover his maintenance, cure and wages during his disability.

The foregoing cases follow the reasoning of the United States Supreme Court in *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424, 83 L. ed. 424, 1939 A.M.C. 1, wherein the Court stated:

"Seamen are the wards of admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the

special circumstances attending their calling. * * *
It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end."

The same liberal construction compels the finding that the injuries sustained by the appellant herein were such as would entitle him to the protection of the laws enacted for the benefit and protection of seamen.

III.

**Is It Wilful Misconduct Upon the Part of a Seaman
to Use Facilities Provided for Him by the United
Seaman's Service Club, When They Are Used
in the Accepted Manner?**

Upon the bulletin board of the S.S. "Cape Saunders" there was a printed notice advising the members of the crew that the water, drinks and food in the City of Manila were contaminated, but there was a Seaman's Club to which they could go that provided food, beer, games, swimming pool and reading rooms.

The appellant went to this Club. After he had three bottles of beer during a period of an hour and one-half, he rented some trunks from the Club, together with another member of the crew of his vessel, and went swimming. These two men had been swimming for about twenty minutes. Stone, the First Assistant Engineer, dove from the springboard into the pool several times. The appellant on each occasion followed Stone. The pool was not fully filled. At the point the appellant came up from his dive, the water was between three and four feet deep. The springboard was located over the deep end, and they dove in the direction of the shallow end of the pool. Aft-

er having used the board several times, appellant struck his head with a glancing blow on the bottom of the pool. He sustained injuries which turned out to have been quite serious.

The finding of the lower Court, with respect to this conduct, is a question of law, and not one of fact. It is respectfully submitted that these facts do not constitute wilful misconduct upon the part of the appellant. While a pool full of water would give greater protection to a diver, the evidence in this case that others were using the springboard at the time, together with the facts that trunks were being rented to men for use in the swimming pool and no warning or notice given that it was unsafe to use the springboard, would seem to be conclusive that the use of the springboard did not constitute wilful misconduct, or even misconduct upon the part of the appellant.

There is no evidence in the record as to the depth of the water at the point of entry into the water. There is the evidence that the springboard was situated at the deep end of the pool.

It seems that the reasoning of Judge Stephens in *Sundberg v. Washington Fish & Oyster Co.*, 138 F. (2d) 801, is controlling in the case at bar. In that case the Court held in following the *Aguilar* case, *supra*:

“Appropriately it (liability) covers all injuries and ailments incurred without misconduct on the seaman’s part amounting to ground for forfeiture, at least while he is on the ship, ‘subject to the call of duty as a seaman, and earning wages as such.’ ”

Certainly the conduct of the seaman in this case could not be said to be such as would be ground for his being logged. Had he gone out and become infected with a

venereal disease, and was unable to resume his employment for a period of time by reason thereof, he properly should be logged. So would be the case of a seaman becoming intoxicated on shore and who received disabling injuries in a drunken brawl that resulted from his intoxication.

In the case at bar we have an injury sustained while engaged in a clean and wholesome sport at a place recommended by the employer.

IV.

Is an Injured Seaman Entitled to Receive the Costs of His Repatriation to the Point of Shipment, When Injured During the Voyage for Which He Was Employed and Which Required Hospitalization Until After the Voyage Terminated?

The cases seem to be without exception that an injured seaman is entitled to his repatriation expense. They are as follows:

Allen v. S. S. Hawaiian, 53 Fed. Supp. 985;

Miller v. United States, 51 Fed. Supp. 924;

The Centennial, 10 Fed. 397; and

The William Penn (E. D. N. Y.), 1925 A. M. C. 1316.

It would neither be consonant with the liberality which courts of admiralty have displayed towards seamen, who are their wards, nor with the doctrine of sound maritime policy to permit injured seamen to become stranded, without funds with which to return to their port of shipment. The obligation of the employer is not terminated by his returning the injured seaman to any port in the United States.

Conclusion.

It is respectfully submitted that the judgment of the United States District Court in this case be reversed so as to permit the recovery by the appellant of his wages to the end of the voyage, in the sum of \$464.60, less withholding and Social Security taxes; together with his maintenance at the rate of \$5.50 per day from January 6 to September 30, 1946, a total sum of \$1,474.00 and for his repatriation expense in the sum of \$20.00.

Respectfully submitted,

DAVID A. FALL,

Proctor for Appellant.

APPENDIX.

Assignments of Errors.

I.

The District Court erred in not finding that on the 4th day of October, 1945, when the S. S. "Cape Saunders" was anchored in Port of Manila, Phillipine Islands, in the course of her said voyage, the libelant went ashore on leave from said vessel to the United Service Seaman's Club, a club maintained for the use of American merchant seamen, exclusively; and that libelant sustained injuries consisting of a fracture of the vertebrae while diving in the swimming pool maintained by said club after he had rented trunks from said club for use in swimming in the pool maintained and operated by said club.

II.

That the District Court erred in not finding that by reason of the injuries sustained by the libelant, while ashore in Manila, he was permanently disabled from the 4th day of October, 1945, to and including the 30th day of September, 1946, and that said injuries, while sustained ashore, were sustained while libelant was engaged in activities incident to his employment.

III.

The District Court erred in not finding that libelant was entitled to his wages from the 5th day of October, 1945, to and including the 13th day of December, 1945, the day upon which the S. S. "Cape Saunders" completed the voyage for which libelant had been employed as a member of its crew.

IV.

The District Court erred in not finding that the libelant was entitled to recover the sum of \$464.60 wages which he would have earned from the 5th day of October, 1945, to and including the 13th day of December, 1945, on the S. S. "Cape Saunders."

V.

That the District Court erred in not finding that the libelant was entitled to recover his repatriation costs from San Francisco, California, to the Port of Los Angeles, California, the port of his shipment aboard the S. S. "Cape Saunders," in the sum of \$20.00.

VI.

That the District Court erred in not finding that the libelant was entitled to recover from respondent the sum of \$20.00, the cost of his repatriation from the port he was repatriated to the United States to the port of his shipment aboard the S. S. "Cape Saunders."

VII.

That the District Court erred in not finding that the libelant was entitled to recover the sum of \$5.50 per day maintenance from the 6th day of January, 1946, to and including the 30th day of September, 1946.

VIII.

That the District Court erred in not finding that the libelant was entitled to recover the sum of \$1474.00 maintenance from the 6th day of January, 1946, to and including the 30th day of September, 1946.

IX.

That the District Court erred in finding that libelant went ashore on the 4th day of October, 1945, on his own initiative and for personal reasons not connected with his employment on board the S. S. "Cape Saunders."

X.

That the District Court erred in finding that libelant was an experienced swimmer and diver and knew or should have known that the depth of the water in the pool was insufficient to enable him to dive from said spring-board with safety; that the District Court in connection therewith erred in finding that the libelant wilfully and recklessly dove in the said pool when the water was too shallow to permit diving, and under such circumstances knew or should have known that injury was virtually inevitable.

XI.

That the District Court erred in finding that the libelant did or should have realized the personal risk entailed in the probable consequences in the dive he made into the pool from which he sustained his injuries.

XII.

That the District Court erred in finding that libelant's injuries and resulting damages were solely and proximately caused by libelant's wilful misconduct.

XIII.

That the District Court erred in finding that libelant's injuries were sustained outside the scope and course of his employment.

XIV.

That the District Court erred in not finding that the injuries sustained by the libelant were sustained by him while engaged in activities incident to the service to his ship, and therefore were in the service of his ship.

XV.

That the District Court erred in holding that the libelant recover nothing from respondent American Hawaiian Steamship Company, a corporation.

XVI.

That the District Court erred in dismissing the libel of this libelant.

XVII.

That the District Court erred in not holding that libelant is entitled to recover judgment against respondent in the sum of \$1,958.63, with interest thereon from the dates his wages, maintenance, and repatriation were due and payable.

No. 11621

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GROVER J. ELLIS,

Appellant,

vs.

AMERICAN HAWAIIAN STEAMSHIP COMPANY, a corpora-
tion,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

	PAGE
Statement of the case.....	1
Argument	3
I.	
Trial de novo.....	3
II.	
A seaman who sustains personal injuries while he is voluntarily and of his own initiative using the facilities of a seamen's club swimming pool some eight to ten miles from the harbor is not injured within the scope and course of his employment	4
III.	
Appellant is precluded from recovering wages, maintenance and repatriation by reason of his wilful misconduct.....	8
IV.	
Appellant is not entitled to recover the cost of his transportation from San Francisco to Los Angeles.....	15
Conclusion	16
Supplement :	
Findings of fact and conclusions of law.....	Supp. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Aguilar v. Standard Oil Co., 318 U. S. 724, 87 L. Ed. 1107.....5,	7
Ernest H. Meyer, The, 84 F. (2d) 496.....	3
Jackson v. Pittsburgh S.S. Co., 131 F. (2d) 668.....	13
Lottawanna, The, 21 Wall. 558, 22 L. Ed. 654.....	5
Melody, The, 157 F. (2d) 448.....	4
Meyer v. Dollar S.S. Line, 49 F. (2d) 1002.....	12
Moss v. Alaska Packers Ass'n, 70 Cal. App. (2d) 857, 1945 A. M. C. 493.....	4
Shangho, The, 88 F. (2d) 42.....	4
Siclana v. United States et al., 56 F. Supp. 442.....	7
Silver Palm, The, 94 F. (2d) 754.....	4
Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 83 L. Ed. 265	7
Southern Pacific Co. v. Jensen, 244 U. S. 205, 61 L. Ed. 1086....	5
Sundberg v. Washington Fish & Oyster Co., 138 F. (2d) 801....	11
Taylor v. United Fruit Company, 1947 A. M. C. 164.....	5
Thomas v. Pacific Steamship Lines, 84 F. (2d) 506.....	4
United States v. Johnson, 160 F. (2d) 789.....	15

TEXTBOOKS

Simmons and Gentzkow, U. S. Army, "Laboratory Methods of the United States Army," 5th Ed. (1944), pp. 344-345.....	14
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No. 11621
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GROVER J. ELLIS,

Appellant,

vs.

AMERICAN HAWAIIAN STEAMSHIP COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

The United States of America at all times herein mentioned was the owner of the S.S. "Cape Saunders", and the American-Hawaiian Steamship Company was acting as agent for the United States of America in the operation thereof (Ap. 99).

On the 11th day of August, 1945, appellant Grover J. Ellis signed shipping articles at Los Angeles, California, as third-assistent engineer for a foreign voyage and back to a final port of discharge in the United States, for a term of time not to exceed twelve months (Ap. 53, 54). During the course of the voyage and while the S.S. "Cape Saunders" was anchored in the port of Manila, Philippine Islands, appellant sustained certain personal injuries while ashore and off duty (Ap. 93).

Appellant went ashore at Manila about 12:00 o'clock noon on October 4, 1945 with a fellow officer for recreational purposes (Ap. 41). Appellant testified that he

and his companion hitchhiked (Ap. 41) to a Seamen's Club through the public streets of Manila (Ap. 61). This Seamen's Club was located eight or ten miles or half-way across town from the point where appellant went ashore (Ap. 60, 61, 62). About an hour and one-half after appellant's arrival at the Seamen's Club, during which time appellant sat and drank three bottles of beer with his companion (Ap. 42), he went swimming in the pool located on the premises.

After making two or three dives into the pool appellant waded out of the pool and proceeded to make another dive from the spring board and in doing so struck his head on the bottom of the pool (Ap. 43). The depth of the pool at the deep end where appellant was diving from the diving board came up to his first rib when standing up in the pool and was no more than three or four feet deep (Ap. 47-48).

As a consequence of his injuries, thus sustained, appellant was hospitalized (Ap. 44) and signed off the S.S. "Cape Saunders" on October 4, 1945 by the Master (Ap. 54). Appellant was subsequently repatriated to the United States, arriving in San Francisco on or about January 6, 1946 (Ap. 45).

Appellant seeks in this action to collect unearned wages in a sum equal to what he would have earned had he remained in the employ of the S.S. "Cape Saunders" from the date of his discharge to the end of the voyage on December 13, 1946, maintenance from the 6th day of January, 1946 to October 1, 1946 and the cost of his transportation from San Francisco to Los Angeles. Appellant was repatriated from Manila to San Francisco by the United States Army (Ap. 36) and incurred no expenses for his medical care (Ap. 50).

ARGUMENT.

I.

Trial De Novo.

Notwithstanding that an appeal in Admiralty is a trial de novo it is an appeal and every intendment should be and is under the decisions of this circuit in favor of the decision of the Trial Court. Unless the decisions of the District Court Judges before whom these cases are actually tried are given the weight to which they are entitled our trial courts will perform no greater judicial function than that of an evidence gathering agency.

Encouragement should not be given to unsuccessful litigants to bring each case to the next highest court on the fortuitous chance that the triers in the second instance may, as in the case of all things human, reach a different conclusion.

The apostles on appeal show that the appellant testified in open court, and the District Court had the opportunity of seeing and hearing his testimony and continuously propounded questions to him.

This court in numerous cases has affirmed the well established rule that decisions of the trial court, in admiralty, when based upon testimony heard in open court by the trial judge, will not be disturbed by the Appellate Court.

In the case of *The Ernest H. Meyer* (C.C.A. 9) 84 F. (2d) 496, this court, at page 500, said:

“Until in this or some other case the Supreme Court shall clear up the doubt, we therefore adhere to the rule as stated in *The Andrea F. Luckenbach*, (C.C.A.) 78 F. (2d) 827, 828, as follows: ‘The well

established rule is applicable that the decision of the trial court in admiralty cases upon controverted questions of fact will not be disturbed by the appellate court unless clearly against *the weight* of the evidence.' ”

See also :

Thomas v. Pacific Steamship Lines, 84 F. (2d) 506 (C.C.A. 9);

The Shangho, 88 F. (2d) 42 (C.C.A. 9);

The Silver Palm, 94 F. (2d) 754 (C.C.A. 9);

The Melody, 157 F. (2d) 448 (C.C.A. 9).

II.

A Seaman Who Sustains Personal Injuries While He Is Voluntarily and of His Own Initiative Using the Facilities of a Seamen's Club Swimming Pool Some Eight to Ten Miles From the Harbor Is Not Injured Within the Scope and Course of His Employment.

Appellant of course does not agree with the foregoing statement and cites four cases in support of his contention in opposition thereto. Two of these cases are State court cases and do not represent the law in this circuit nor in any other circuit so far as appellee has been able to ascertain.

The first of the State court cases cited in support of appellant's contention is that of *Moss v. Alaska Packers Ass'n*, (1945) 70 Cal. App. (2d) 857, 1945 A.M.C. 493. This case was decided by the Appellate Department of the

Superior Court of the City and County of San Francisco. The other State decision cited in support of appellant is that of *Taylor v. United Fruit Company* (1946), 1947 A.M.C. 164, decided by the Municipal Court of the City of New York.

That local State court decisions are not binding on courts of admiralty is axiomatic. It has often been observed by the United States Supreme Court that the Constitution contemplated a system of admiralty and maritime law coextensive with and operating uniformly in the whole country. *The Lottawanna* (1874), 21 Wall. 558, 22 L. Ed. 654; *Southern Pacific Co. v. Jensen* (1917), 244 U.S. 205, 61 L. Ed. 1086.

Appellant cites the case of *Aguilar v. Standard Oil Co.*, (1942) 318 U.S. 724, 87 L. Ed. 1107. This case involved two suits for wages, maintenance and cure. In one of these suits the seaman was injured while leaving his vessel for shore leave and in the second the seaman was injured while returning to his vessel from shore leave. In both suits the injury to the seaman occurred while he was traversing an area between his moored ship and the public streets by an appropriate route. In reaching its conclusion that the seamen were injured within the course and scope of their employment the court reasoned at page 737 in an opinion delivered by Mr. Justice Rutledge as follows:

“We can see no significant difference, therefore, between imposing the liability for injuries received in boarding or quitting the ship and enforcing it for in-

juries incurred *on the dock or other premises which must be traversed in going from the vessel to the public streets or returning to it from them.* That much at least is within the liability. How far it extends beyond that point we need not now determine.” (Italics added.)

Appellant attempts to extend this decision to cover the case at bar. We submit that to do so is to ignore the principles upon which the decision is predicated. Recognizing that seamen must be given an opportunity to obtain relaxation ashore the Supreme Court by this decision placed upon the maritime employer the obligation of providing a safe passage to and from the vessel. In short, the court saw little difference between liability for injuries received while using the gangway and those sustained while proceeding from the gangway to the public streets. There is much logic in this reasoning, for a seaman has no more choice or control of the gangway he uses than he has of the adjoining premises leading to the public streets. The choice of berth lies exclusively with the steamship. We submit that the decision does not nor did the Supreme Court intend to extend the phrase “scope of employment” to include personal activities of seamen while ashore on public streets or while patronizing public clubs of the seaman’s choosing. If the Supreme Court had been of the opinion that this phrase was without limitation with reference to the place of the injury it would not have limited its decision to “*the dock or other premises which must be*

traversed in going from the vessel to the public streets or returning to it from them."

The last case cited by appellant is the case of *Sacony-Vacuum Oil Co. v. Smith*, (1939) 305 U.S. 424, 83 L. Ed. 265. This involved a suit under the Jones Act and the issue presented to the Supreme Court was whether a seaman assumes the risk of defective ship appliances and is therefore not analogous to the case at bar. We therefore fail to see the relevancy of that portion of the court's opinion quoted by appellant.

The case of *Siclana v. United States et al*, (D.C., S.D. N.Y., 1944) 56 F. Supp. 442, decided subsequent to the *Aguilar v. Standard Oil Co.* decision, *supra*, involved a suit by a seaman for injuries sustained while he was returning to his vessel when he was jumped upon by certain unidentified men. The court sustained an exception to the libel, stating that the *Aguilar* decision did not support the libel. After quoting a portion of the *Aguilar* decision the court distinguished the case then before it as follows:

"In the case at bar the locality of the attack is not identified. Its proximity to the place of employment (the ship) is not disclosed and it may have been so far remote that his employer may not have been under any duty of responsibility whatever."

The injuries sustained by appellant herein were received while he was diving in a private pool the locality of which was so far removed from the vessel (eight to ten miles) that it cannot be said that the vessel was under any duty of responsibility whatsoever. This pool was operated by a private, charitable, non-profit organization unconnected with appellee (Ap. 119).

III.

Appellant Is Precluded From Recovering Wages, Maintenance and Repatriation by Reason of His Wilful Misconduct.

In this connection the Trial Court at the conclusion of the trial said :

“I do not see how the libelant is entitled to recovery. It looks to me like he comes within the decision of *Jackson v. Pittsburgh Steamship Company*, 131 F. (2d) 668, where there was a suit under the Jones Act in the first cause of action and maintenance and cure in the second cause of action, and that is where the sailor jumped from the ship to the deck and was injured. There the Court, without appearing to do so, practically adopted the decision of the Ninth Circuit in the Meyer case in its definition of what was meant by ‘in the service of the ship,’ and in this case I think that is probably the correct definition. I will read it again. I read it this morning.

‘When a seaman, by his own volition, creates an extraneous circumstance, he brings about an intervening cause that directly affects his relation to his employers and to the ship. He is responsible for such intervening cause if it consists of his own wilful misconduct, is something which is done in pursuance of some private avocation or business, or grows out of relations unconnected with the service or is not the logical incident of duty in the service.’

It seems to me that his diving into the swimming pool, when it had a small amount of water, from a diving board, a grown man, 22 years old, who had been swimming many previous times in swimming pools and was a good diver, that he created an intervening cause of his own volition which caused the accident, and that the respondent is not liable.” (Ap. 127, 128.)

and thereafter rendered its Findings of Fact and Conclusions of Law reading in part as follows:

“IV.

“That on or about the 4th day of October, 1945, and while the S. S. ‘Cape Saunders’ was anchored in the port of Manila, Philippine Islands, in the course of her said voyage, the libelant went ashore on his own initiative and for personal reasons unconnected with his employment aboard the S. S. ‘Cape Saunders’; that while ashore libelant hitch-hiked his way through the public streets of Manila to the Seamen’s Club, situated between eight or ten miles distant from the dock landing where libelant went ashore; that while libelant was at the club and after he had consumed three bottles of beer libelant went swimming in the pool located at said club; that after swimming in said pool for approximately twenty (20) minutes and while diving from a three-foot spring board the libelant struck his head at the bottom of the pool and thereby sustained certain personal injuries.

“V.

“That the pool was not full of water and the depth of the water in the pool where libelant was diving was only between three and four feet deep; that libelant was and is between five feet eight and one-half inches and five feet nine inches tall and that when he stood up the water only came to about his first rib.”

“VII.

“That libelant was an experienced swimmer and diver and knew or should have known that the depth of the water in the pool was insufficient to enable him to dive from said springing board with safety;

that libelant wilfully and recklessly dove into said pool at a time when the water was too shallow to permit diving and under such circumstances knew or should have known that injury was virtually inevitable.

“VIII.

“That libelant is twenty-four (24) years of age and holds a marine license of Third Assistant Engineer and also a Stationary Engineer’s license in the City of Los Angeles; that his general demeanor in court and the manner and substance of his testimony indicate that he is a man of at least average intelligence and that he did or should have realized the personal risk entailed and the probable consequences of the dive he made into the pool from which he sustained his injuries.

“IX.

“That libelant’s injuries and resulting damages were solely and proximately caused by libelant’s wilful misconduct.” (Ap. 16, 17 and 18)

The complete Findings of Fact and Conclusions of Law are found on pages 15 to 18, inclusive, of the Apostles on Appeal and for the convenience of this court are attached to this brief.

Appellant argues that the findings of the District Court in this respect are but conclusions of law. Appellant himself admitted that he had consumed no less than three bottles of beer (Ap. 42) prior to the time he commenced diving. That libelant’s use of the diving board under the circumstances then prevailing was wilful misconduct is hardly questionable. He testified that he dove from a three-foot spring board (Ap. 43) into water that came only to his first rib (Ap. 48). Appellant admitted of hav-

ing made two or three previous dives and as he stated "waded out of the pool" and dove again (Ap. 43). Appellant admitted that he had previous experience in swimming pools and was a good swimmer (Ap. 121-122). Appellant was a licensed officer, and at the time of trial he was twenty-four years of age. (Ap. 44). From these facts it cannot logically be concluded that the finding of wilful misconduct by the District Court was a conclusion of law.

Appellant argues that inasmuch as he was allowed to use the pool while only partially filled and there were no warning signs it was not misconduct on his part. The fact remains, however, that appellant was aware that the pool was but partially filled before he made his unfortunate dive and realized or should have realized the personal risk entailed and the probable consequences of the dive he made into the pool from which he sustained his injuries (Ap. 17, 18). Appellant further argues that others were using the spring board. By appellant's own testimony it appears that the only other person using the spring board was appellant's companion (Ap. 43). Appellant further points out that the accident occurred at the deep end of the pool with which we have no quarrel. From this, however, it cannot be inferred that the water was any deeper than the appellant's testimony would indicate. It would appear that the depth at the shallow end was less than one foot (Ap. 97).

Appellant has quoted a portion of the decision of this court in *Sundberg v. Washington Fish & Oyster Co.*

(C.C.A. 9) 138 F. (2d) 801 and suggests that the reasoning is controlling in the case at bar. It appears from that decision that the injured seaman was shot on board ship by a fellow seaman. The question of misconduct was not involved. It further appears from the decision that the injured seaman did not know that the fellow seaman who shot him was even on deck until he was hit. There is no analogy to be drawn from that decision to the case at bar.

Appellant admits that his case would be different if his incapacity had resulted from infection of venereal disease. If this concession is sound, and we think it is in view of the long line of decisions to this effect, we submit that a seaman who voluntarily and knowingly dives into water too shallow to break the force of his dive stands in no better position, especially where he is a good swimmer and injury might have been expected to result therefrom (Ap. 18).

Appellant seeks to justify his wantonness and recklessness by characterizing his activities as a clean and wholesome sport. Could it not likewise be argued on behalf of the seaman with a venereal disease that there is a physiological justification for his conduct? Maritime employers are not insurers of the health of employees. If a seaman shows no more concern for his physical safety than did appellant, he should not be heard to complain to his employer for restitution. In short, as pointed out by this court in *Meyer v. Dollar S.S. Line*, (C.C.A. 9) 49 F. (2d) 1002, p. 1004, "he was the author of his own misfortune."

The case at bar falls squarely within the decision of *Jackson v. Pittsburgh S.S. Co.* (1942 C.C.A. 6) 131 F. (2d) 668. The facts and reasoning are summarized in the following excerpt from the court's opinion:

"When a seaman, by his own volition, creates an extraneous circumstance, he brings about an intervening cause that directly affects his relation to his employers and to the ship. He is responsible for such intervening cause if it consists of his own wilful misconduct, is something which is done in pursuance of some private avocation or business, or grows out of relations unconnected with the service or is not the logical incident of duty in the service. The *Osceola*, *supra*; *Meyer v. Dollar S.S. Line*, 9 Cir., 49 F. 2d 1002.

"The plaintiff was not compelled to jump from the ship. The only expectable injury that he might have suffered from the failure to provide a ladder would have been some inconvenience or delay in leaving the vessel. This could readily have been avoided or minimized either by putting the ladder in place himself or in requesting someone in authority to direct that it be done. When he leaped from the ship under circumstances where injury might reasonably be expected to result, he acted on his own volition, in the pursuit of his personal affairs, and was not injured 'in the service of the ship.' " (Italics added.)

Appellant was taken to the 49th General Hospital at Manila after the accident in the swimming pool (Ap. 62). The certificate of the United States Army Forces Western Pacific, 49th General Hospital, was introduced into

evidence by appellee (Ap. 66). This certificate shows a diagnosis of an alcohol blood test of appellant as follows:

“Alcoholism, acute, moderate, blood alcohol level 1 Mg/cc at 1815 hours, 4 October 1945”.

According to appellant's testimony, the injury occurred between 1:20 and 2:50 P. M. (Ap. 43). While we do not here contend that appellant was definitely intoxicated it does appear that his indiscretion may have resulted from the effects of alcohol which is shown by the hospital certificate to have been one milligram of alcohol per cubic centimeter of blood over three hours after the accident.

An interpretation of this blood analysis may be found in a work entitled “Laboratory Methods of the United States Army”, Fifth Edition (1944), Edited by Dr. James Stevens Simmons, Brigadier General, United States Army, and Dr. Cleon J. Gentzkow, Colonel, Medical Corps., United States Army, and approved by the Surgeon General of the United States Army. At pages 344-345 this analysis is interpreted as follows:

“At a level of 1 to 1.5 mg. of alcohol per c.c. of blood an individual is usually under the influence of liquor, but not definitely intoxicated.”

While we concede that standing alone the degree of intoxication above indicated might not suffice to defeat appellant's claim we think that when considered with all the evidence in this case the only logical conclusion is that appellant's injuries were occasioned by his own wilful misconduct.

IV.

**Appellant Is Not Entitled to Recover the Cost of
His Transportation From San Francisco to Los
Angeles.**

The shipping articles (Ap. 53) provided for a voyage from the "Port of Los Angeles, Calif., to a point in the Pacific Ocean to the westward . . . and back to a final port of discharge in the United States, . . . " Under this employment agreement any obligation to repatriate the appellant terminated when he was repatriated to the Port of San Francisco without cost to him.

Appellant cites four cases in an attempt to support his theory that appellant is entitled to recover his transportation costs from San Francisco to Los Angeles, none of which are in point. Since this question has recently been decided contrary to the position of appellant we will rely entirely on that decision in *United States v. Johnson*, (1947 C.C.A. 9) 160 F. (2d) 789, wherein this court in a similar situation said,

"he is not entitled to travel expenses from San Francisco to the Port of Los Angeles."

Conclusion.

Appellee respectfully submits that the injuries of appellant were not sustained within the scope and course of his employment but that in any event he has precluded any recovery by his own wilful misconduct and therefore the final decree of the District Court should be affirmed.

Respectfully submitted,

L. K. VERMILLE,

DAN BRENNAN,

OVERTON, LYMAN, PLUMB,

PRINCE & VERMILLE,

*Proctors for Appellee American Hawaiian Steamship
Company.*

SUPPLEMENT.

[TITLE OF COURT AND CAUSE.]

Findings of Fact and Conclusions of Law.

The above entitled action came on regularly for trial on the 29th day of January, 1947, before the Hon. Pierson M. Hall, United States District Judge, the libelant being represented by David A. Fall, Esq.; respondent American Hawaiian Steamship Company being represented by Messrs. Overton, Lyman, Plumb, Prince & Vermille by L. K. Vermille, Esq. and Dan Brennan, Esq.; and evidence, oral and documentary, having been introduced, and the Court having considered the evidence and the law and the arguments of counsel, and being fully advised in the premises, and all proceedings having been duly and regularly taken, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT.

I.

That libelant was the Third Assistant Engineer on board the S. S. "Cape Saunders," having signed articles on or about the 7th day of August 1945 at Los Angeles, California for a voyage not to exceed six (6) months bound for foreign ports and return to a continental port of the United States of America.

II.

That the Shipping Articles signed by libelant for said voyage provided that the United States of America and the War Shipping Administration were the Operating Company of said S. S. "Cape Saunders" for said voyage and that libelant should receive wages in the sum of Two Hundred and Two Dollars (\$202.00) per month.

III.

That the American Hawaiian Steamship Company was an agent of the United States of America and the War Shipping Administration in the operation of said vessel.

IV.

That on or about the 4th day of October, 1945, and while the S. S. "Cape Saunders" was anchored in the port of Manila, Philippine Islands, in the course of her said voyage, the libelant went ashore on his own initiative and for personal reasons unconnected with his employment aboard the S. S. "Cape Saunders"; that while ashore libelant hitch-hiked his way through the public streets of Manila to the Seamen's Club, situated between eight or ten miles distant from the dock landing where libelant went ashore; that while libelant was at the club and after he had consumed three bottles of beer libelant went swimming in the pool located at said club; that after swimming in said pool for approximately twenty (20) minutes and while diving from a three-foot spring board the libelant struck his head at the bottom of the pool and thereby sustained certain personal injuries.

V.

That the pool was not full of water and the depth of the water in the pool where libelant was diving was only between three and four feet deep; that libelant was and is between five feet eight and one-half inches and five feet nine inches tall and that when he stood up the water only came to about his first rib.

VI.

That the club and all of its facilities including the pool were maintained and controlled by a private charitable service organization and in no way connected with or

under the jurisdiction or control of the respondent American Hawaiian Steamship Company, or the United States of America or the War Shipping Administration.

VII.

That libelant was an experienced swimmer and diver and knew or should have known that the depth of the water in the pool was insufficient to enable him to dive from said springing board with safety; that libelant wilfully and recklessly dove into said pool at a time when the water was too shallow to permit diving and under such circumstances knew or should have known that injury was virtually inevitable.

VIII.

That libelant is twenty-four (24) years of age and holds a marine license of Third Assistant Engineer and also a Stationary Engineer's license in the City of Los Angeles; that his general demeanor in court and the manner and substance of his testimony indicate that he is a man of at least average intelligence and that he did or should have realized the personal risk entailed and the probable consequences of the dive he made into the pool from which he sustained his injuries.

IX.

That libelant's injuries and resulting damages were solely and proximately caused by libelant's wilful misconduct.

X.

That libelant's injuries were sustained outside the scope and course of his employment.

XI.

That libelant was taken to the United States Forty-Ninth General Hospital in Manila, Philippine Islands and subsequently flown to the United States Marine Hospital at San Francisco, California, where he received hospital care until January 6, 1946; that soon thereafter libelant returned to Los Angeles where he received out patient care from time to time and for several months from the United States Public Health Service at Los Angeles.

XII.

That libelant's hospital care and medical needs were supplied and furnished without cost to him; that libelant was repatriated from Manila, Philippine Islands to San Francisco without cost to him; that libelant paid his own plane fare of Twenty Dollars (\$20.00) from San Francisco to Los Angeles and that said sum is the reasonable cost of said fare.

From the foregoing findings of fact the Court makes the following conclusions of law:

CONCLUSIONS OF LAW.

That the libelant Grover J. Ellis is not entitled to recover any sum whatsoever from the respondent American Hawaiian Steamship Company, a corporation, and that said libel should be dismissed without costs to said respondent.

PEIRSON M. HALL,

United States District Judge.

DAVID A. FALL,

Proctor for Libelant.

No. 11,622

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HILLIARD SANDERS, United States Pen-
itentiary, Alcatraz, California,

Appellant,

vs.

JAMES A. JOHNSTON, Warden, United
States Penitentiary, Alcatraz, Cali-
fornia,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,
Post Office Building, San Francisco, California,

Attorneys for Appellee.

FILED

OCT 1 1937

PAUL P. O'BRIEN,



Subject Index

	Page
Jurisdictional statement	1
Statement of the case	2
Question	4
Contention of appellee	4
Argument	4
Conclusion	7

Table of Authorities Cited

Cases	Pages
Demolli v. U. S., 144 Fed. 363, 367	3, 5, 6
In re Edwards, 106 F. (2d) 537, 538.....	5
Pointer v. United States, 151 U. S. 396, 419, 14 Sup. Ct. 410, 38 L. Ed. 208	3, 6
Walker v. Johnston, 312 U. S. 275, 284	3, 6
White v. United States, 164 U. S. 100, 101.....	6

Statutes

Title 28 U.S.C.A., Sections 451, 452 and 453.....	1
Title 28 U.S.C.A., Sections 463 and 225.....	1

No. 11,622

IN THE

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HILLIARD SANDERS, United States Pen-
itentiary, Alcatraz, California,
Appellant.

vs.

JAMES A. JOHNSTON, Warden, United
States Penitentiary, Alcatraz, Cali-
fornia,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", denying appellant's petition for writ of habeas corpus and discharging the order to show cause. (Tr. 33, 34.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A., Sections 451, 452 and 453. Jurisdiction to review the District Court's order denying the petition is conferred upon this Court by Title 28 U.S.C.A., Sections 463 and 225.

STATEMENT OF THE CASE.

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus in which he contended that his detention by the appellee, the Warden of the said penitentiary, was illegal because the written sentence and judgment under which he was held did not set forth the plea, recite the verdict or findings, or contain an adjudication of his guilt. (Tr. pp. 1 through 5.) Thereafter the Court below issued an order to show cause (Tr. p. 6) and the appellee filed a return to order to show cause in which he included as an exhibit, copies of the indictment, docket entries, sentence and judgment, commitment and Marshal's return on service of commitment, which documents were certified by the Clerk of the trial Court, and transfer order and record of Court commitment, certified by the Record Clerk of the said penitentiary. (Tr. pp. 7 through 27.) The appellant then filed a motion to strike the exhibits, on the ground that they were immaterial and irrelevant (Tr. p. 28), and likewise filed a traverse to return to order to show cause. (Tr. pp. 29 through 32.) The matter was then submitted and the Court below filed the following order denying the petition for writ of habeas corpus, discharging the order to show cause and denying appellant's motion to strike:

“The petitioner, an inmate of the United States Penitentiary at Alcatraz Island, California, has filed an application for writ of habeas corpus in which he alleges that his detention by the re-

spondent, the Warden of the said penitentiary, is invalid because the formal sentence and judgment under which he is presently confined does not contain a recital of the plea, the verdict of findings or an adjudication of guilt.

In response to the order to show cause, which was issued herein, respondent filed a return, to which was attached as 'Exhibit A', among other documents, a certified copy of the indictment in which the petitioner was charged before the District Court of the United States for the District of Maryland, with armed bank robbery, a certified copy of the docket entries, and the commitment, which indicated that subject had been convicted by a jury for the aforesaid offense and sentenced on February 5, 1942, to a term of twenty years imprisonment and to pay a fine of \$5,000. Petitioner thereafter filed a traverse to the return and a motion to strike respondent's Exhibit A on the ground that the said exhibit is immaterial to the issues of this case.

In

Demolli v. U. S., 144 Fed. 363, 367,

on which respondent relies, the Court held that the entire record may be examined to determine the basis for prisoner's detention, citing

Pointer v. United States, 151 U. S. 396,
419, 14 Sup. Ct. 410, 38 L. Ed. 208.

Inasmuch as the pleadings in this case show sufficient grounds for the detention of the prisoner, there is no necessity for the issuance of a writ of habeas corpus and the holding of a hearing thereon.

Walker v. Johnston, 312 U. S. 275.

It is therefore ordered that petitioner's motion to strike respondent's Exhibit A be, and the same is hereby, denied, and it is further ordered that the petition for writ of habeas corpus herein be, and the same is hereby, denied, and the order to show cause heretofore issued, be, and the same is hereby, discharged.

Michael J. Roche,
United States District Judge."

From this order appellant now appeals to this Honorable Court. (Tr. p. 35.)

QUESTION.

Are the records of the trial Court sufficient to warrant appellee's detention of appellant?

CONTENTION OF APPELLEE.

The answer to the above question is: Yes.

ARGUMENT.

On the record before it, the Court below properly decided that the appellant was within the legal custody of the appellee. The appellant's attack on the written sentence and judgment fails because the missing elements are supplied by the other records of the trial Court, which appellee has made a part of his return.

In

Demolli v. U. S., 144 Fed. 363, 367,

cited by the Court below in its order denying the petition for writ of habeas corpus, it was held that the entire record may be examined to determine the basis for a prisoner's detention. Said the Circuit Court of Appeals for the Eighth Circuit:

“Objection is made to the sentence imposed on the defendant because it does not contain a formal adjudication of his guilt or specify the offense for which he was sentenced. If the judgment as entered were alone to be examined, the objection would be well taken. But the record of the proceedings in the District Court shows, with such appropriate connections, the return of the indictment by the grand jury, the indictment, itself, and every other step in the progress of the case, including the verdict and sentence, as to avoid any doubt respecting the offense of which the defendant was found guilty by the jury and on account of which sentence was imposed by the court. The case is in this respect within the ruling of *Pointer v. United States*, 151 U. S. 396, 419, 14 Sup. Ct. 410, 38 L. Ed. 208, where it was held that all parts of the record are to be interpreted together, effect being given to all, if possible, and that a deficiency at one place may be supplied by what appears in another. The objection is therefore not well taken.” (Tr. pp. 9-10.)

In

In re Edwards, 106 F. (2d) 537, 538,

a case similar to our case at bar, the Circuit Court of Appeals for the Eighth Circuit likewise held that habeas corpus would not lie where the sentence failed

to contain a statement of, or identification of, the crime for which sentence was entered. The Court said, citing

Pointer v. United States, 151 U. S. 396, 418;
White v. United States, 164 U. S. 100, 101, and
Demolli v. United States, *supra*,

“Appellant contends the sentence must contain such a statement as ‘for violating the Interstate Commerce Law, Title 18, Section 408, U.S.C.A.’

The order of sentence was as follows:

United States
 vs. No. 5705
 Courtney Edwards, alias Courtney Jett
 Order
 Entered June 29th, 1935

“This cause coming on for sentence, defendant, having nothing further to say, is sentenced to be committed to the custody of the Attorney General, or his authorized representative for confinement in an institution of the Penitentiary type for a period of Five Years, and he is now committed.

H. Church Ford, Judge.”

This order of sentence was, when considered in connection with the record of the case, sufficient.”

The pleadings in this case showing sufficient grounds for the detention of the appellant, the Court below was under no obligation to issue the writ and properly decided the merits of appellant's petition on the order to show cause.

Walker v. Johnston, 312 U. S. 275, 284.

Finally appellant's contention that the order of the Court below, denying his motion to strike respondent's exhibits on the ground that they are immaterial and irrelevant, is completely without merit, in view of the cases above cited.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the order of the Court below in denying the petition for writ of habeas corpus is correct and should be affirmed.

Dated, San Francisco, California,
October 27, 1947.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee.



No. 11623

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE GARTNER, an Insane Person, and
MIKE ERCEG, Guardian of the Estate of
George Gartner, an Insane Person,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Territory of Alaska, 'Fourth Division

No. 11623

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE GARTNER, an Insane Person, and
MIKE ERCEG, Guardian of the Estate of
George Gartner, an Insane Person,
Appellants,

vs.

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Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Territory of Alaska, 'Fourth Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Answer.....	21
Appeal:	
Citation of.....	120
Cost Bond on.....	117
Notice of.....	93
Order Fixing Amount of Cost Bond and Allowing	116
Petition for Allowance of.....	94
Statement of Points and Designation of Parts of Record on.....	129
Assignment of Errors	96
Agreed Statement of Facts and Stipulation	103
Attorneys of Record.....	1
Certificate of Clerk of the District Court to Transcript of Record.....	127
Citation of Appeal.....	120
Complaint	2
Cost Bond on Appeal.....	117
Demurrer	5, 24
Exhibits, Plaintiff's:	
A—Agreed Statement of Facts and Stipu- lation	124
Judgment	28

Notice of Appeal.....	93
Opinion	6
Order	6
Order 3/26/46	25
Order Allowing Appeal and Fixing Amount of Cost Bond.....	116
Petition for Allowance of Appeal.....	94
Praecipe for Transcript of Record.....	122
Second Amended Answer	25
Statement of Points and Designation of Parts of Record on Appeal.....	129
Stipulation Re Printing of Record.....	121
Transcript of Testimony and Proceedings.....	30
Verdict	27
Witnesses, Plaintiff:	
Haskins, John LeRoy	
—direct	31
—cross	44
—redirect	65
—recross	67
Witnesses, Defendants:	
Erceg, Mike	
—direct	75
Clegg, Cecil H.	
—direct	84



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Fairbanks, Alaska,

CHARLES J. CLASBY,
Fairbanks, Alaska,
Attorneys for Defendants and Appellants.

In the District Court for the Territory of Alaska

Fourth Judicial Division

No. 5368

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE GARTNER, an Insane Person, and
MIKE ERCEG, Guardian of the Estate of
George Gartner, an Insane Person,

Defendants.

COMPLAINT

Comes now the United States of America by Harry O. Arend, United States Attorney for the Fourth Judicial Division of the Territory of Alaska, at the direction and under the authority of the Attorney General of the United States, pursuant to the request of the Comptroller General of said United States, and represents and complains as follows:

I.

That, on the 19th day of July, 1927, in the Probate Court for Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, said defendant, George Gartner, after proceedings duly had, was adjudged an insane person and by the Honorable M. R. Boyd, United States Commissioner and ex-officio Probate Judge of said Probate Court, ordered committed to Morningside Hospital at Portland,

Oregon, under the provisions of the Act of Congress of January 27, 1905, (33 Stat. 619, 48 U.S.C. Sec. 47) and the Act of Feb. 6, 1909, (35 Stat. 601, 48 U.S.C. Sec. 46).

II.

That, on the 1st day of August, 1927, the defendant, Mike Erceg, was duly and regularly appointed Guardian of the Estate of the said George Gartner, an insane person, by order of the said M. R. Boyd, United States Commissioner and ex-officio Probate Judge of the Probate Court for said Fairbanks Precinct; and that the said Mike Erceg on said 1st day of August, 1927, accepted said appointment and duly qualified by taking oath and executing bond, which was by said Probate Judge duly approved, all as required by law, [1*] and ever since said 1st day of August, 1927, said defendant, Mike Erceg, has been, and is now, the guardian of said Estate.

III.

That the said defendant, George Gartner, was admitted to said Morningside Hospital on the 10th day of August, 1927, under said order of commitment, and has remained there continuously since said last mentioned date; and that the said George Gartner is now, and at all times since the 19th day of July, 1927, has been, an insane person.

IV.

That between said 10th day of August, 1927, and the 13th day of October, 1942, both dates inclusive, the plaintiff has expended the total sum of Nine Thousand One Hundred Eighty and 11/100 Dollars

(\$9,180.11) for the care and maintenance of the said George Gartner at said Morningside Hospital, at Portland, Oregon; that said sum of \$9,180.11 is the reasonable cost of the care and maintenance of said defendant, George Gartner, at said hospital during the period aforesaid; and that said defendant, George Gartner, is justly indebted to the plaintiff in said sum of \$9,180.11.

V.

That the plaintiff has made demand upon the said George Gartner, defendant, through his said Guardian, Mike Erceg, for payment of said \$9,180.11; that payment was refused; and that no part of said sum of \$9,180.11 has been paid.

Wherefore the plaintiff prays judgment against the said defendant, George Gartner, for the sum of \$9,180.11, and for the cost of suit and for such other and further relief as to the Court may seem proper.

THE UNITED STATES OF
AMERICA,

/s/ By HARRY O. AREND,

United States Attorney for
Fourth Judicial Division,
Territory of Alaska.

United States of America,
Territory of Alaska—ss.

Harry O. Arend, being first duly sworn, on oath deposes and says: That he is the agent of the plaintiff herein with personal knowledge of the [2] material allegations contained in the foregoing com-

plaint; that he has read said complaint, knows the contents thereof, and believes the same to be true.

HARRY O. AREND.

Subscribed and sworn to before me this 24th day of August, 1945.

[Seal] EMMA M. COOK,
Notary Public in and for
Alaska.

My commission expires 8/22/47.

[Endorsed]: Filed Aug. 24, 1945. [3]

[Title of District Court and Cause.]

DEMURRER

Comes now the above-named defendant and demurs to the Complaint on file herein upon the grounds:

1. That the Court has no jurisdiction of the subject of the action.
2. That the Complaint does not state facts sufficient to constitute a cause of action.

JOHN L. McGINN,
Attorney for Defendants.

Service of the foregoing Demurrer is hereby acknowledged this 6th day of September, 1945.

HARRY O. AREND,
Attorney for Plaintiff.

[Endorsed]: Filed Sept. 6, 1945. [4]

[Title of District Court and Cause.]

ORDER

Arguments on the Defendant's Demurrer to the Complaint having been had by respective counsel on September 17 and 18, 1945, and the Court having taken the matter under advisement and now being fully advised in the premises, it was Ordered that the Demurrer be overruled and the defendants were granted thirty days to answer.

October 31, 1945.

Journal No. 33, Page 14. [5]

[Title of District Court and Cause.]

Harry O. Arend, United States Attorney, of Fairbanks, Alaska, Attorney for the plaintiff;

John L. McGinn, of Fairbanks, Alaska, attorney for the defendants.

OPINION

I.

The complaint, filed on August 24, 1945, alleges as follows: That on the 19th day of July, 1927, the defendant George Gartner was legally adjudged insane in the Probate Court at Fairbanks, Alaska, and Committed to Morningside Hospital at Portland, Oregon; that on the 1st day of August, 1927, the defendant Mike Erceg was duly appointed guardian of the estate of said George Gartner by order of said Probate Court, he qualifying immedi-

ately; that said George Gartner was admitted to said Morningside Hospital on the 10th day of August, 1927, where he has since remained; that the plaintiff has paid the reasonable cost of the care and maintenance of said George Gartner at said Hospital during the said period, to-wit, the sum of \$9,180.11, no part of which has been paid though demanded of the defendant Erceg, as such guardian.

The complaint does not allege that said George Gartner was a pauper, but inferentially shows he was not in that he had property for which a guardian was appointed on the 1st of August, 1927.

The defendants have interposed a general demurrer to the complaint. [6]

II.

As our code made the common law of England, except as modified by statute, the law of Alaska during all time concerned in this case, it becomes necessary to ascertain what the common law was with reference to reimbursement of the sovereign for expenses incurred in the care of an insane person.

In *State v. Ikey's Estate* (Supreme Court of Vermont, 1911) 79 Atl. 850, it was stated:

“It is said by Lord Coke that if a man who was of sound memory becomes non compos mentis, * * * the king shall protect him who cannot protect himself, and shall take the profits of his lands, and of all that he had, and therewith maintain him and his family; but the king shall not take any part of the said

profits to his own use, and that all this appears by the statutes *De Praerogativa Regis*, 17 Edw. 11, c. 10, which was but a declaration of the common law."

"Pollock and Maitland in their *History of English Law* (volume 1, p. 464) say this document known as *Praerogativa Regis* seems to be the oldest that gives any clear information about a wardship of lunatic.

" 'The king is to provide that the lunatic and his family are properly maintained out of the income of his estate * * *' *Bac. Abr. tit. Idiots and Lunatics C.* * * *

"Mr. Stephen says: 'To all lunatics, as well as to idiots, the sovereign is guardian, but to a very different purpose; for the law always imagines that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease, to their representatives.' 2 *Stephen's Com.* (8th Ed.) 511."

The Court said:

"By the common law of England it is the duty of the king to take care of all his subjects who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves."

“Under our form of government the sovereign state has the same common-law duty resting upon it concerning the care and custody of persons and estates of those who are idiots from nativity, or who have lost their intellects, and become non compos, or unable to take care of themselves * * *; and it is manifest from the statutory regulations in this respect that the policy of the state is, as at common law, that the estates of such wards shall be appropriated to their proper maintenance, before they can be supported at the expense of the state.” [7]

A holding contrary to that of *State v. Ikey's Estate*, *supra*, is found in 44 C.J.S., page 177, in the statement, “At common law states and municipalities were not charged with the duty of supporting insane or incompetent persons.” It is based entirely upon the case of *State Department of Public Welfare v. Shirley* (Wisc., 1943) 10 N.W. (2d) 215.

That case lays down the rule above-mentioned, citing only the cases of *Patrick v. Town of Baldwin* (Wisc., 1901) 85 N.W. 274, and *Coffeen v. Town of Preble* (Wisc., 1910) 125 N.W. 954, neither of which hold anything in regard to the duty of a state (or sovereign) toward insane persons, but merely that towns did not at common law have the duty of supporting poor persons.

A distinction between poor persons and insane persons is made, not only at common law, but in most modern statutes.

In the case of *Richardson County v. Frederick, et al.*, (Neb., 1888) 39 N.W. 621, the court said:

“The insane person is not consulted as to whether he shall be deprived of his liberty or not; nor, indeed, are his friends or relatives. As is said in *County of Delaware v. McDonald*, 46 Iowa, 171: ‘The state reaches out its strong arm and makes the insane its wards, regardless of the care which they may receive at home, or the wishes of those upon whom they are dependent for their support. The poor are not deprived of their liberty, and we know of no law which would even permit the county or state authorities to wrest such persons from the care and custody of relatives and friends, and confine them in a poor-house; nor would they be so confined, against their own consent, for no other reason than that they were “unable to earn a livelihood in consequence of any bodily infirmity,” etc. With the insane it is entirely different. * * * Society is entitled to be protected and relieved against him; * * * ’”

In *Dandurand v. Kankakee County* (11, 1902) 63 N.E. 1011, *Dandurand*, an insane person, was cared for by the county which sued to recover the cost thereof. The court said:

“He (*Dandurand*) was in need of board, care and medical attention, and was obviously unfit to be at large, and the county furnished him that care. His conservator knew the facts, and did not offer to provide for him elsewhere, or

take any steps to have any change made. We are of opinion defendant was impliedly liable for these necessities so furnished him. * * *

In *re Yturburru's Estate* (Sup. Ct., Calif., 1901) 66 P. 729, the court held:

“An insane person is liable for the reasonable value of things furnished to him necessary for his support. Civ. Code, sec. 38. This was so at common law, where the necessities were furnished by an individual; and we have never seen a case, and do not think any can be found, holding that this rule comes in conflict with any provision of the Constitution of this or any other state of the Union. We see no reason why the same rule should not apply to a state hospital for the insane which does and furnishes for the insane person only those things required by the law of the state.”

The court, in the case of *Directors of Insane Asylum of New Mexico v. Boyd, et al.*, (N. Mex., 1932), 17 P. (2d) 358, quoted the above by the California court and, in holding the guardian of Boyd liable for her care at the asylum, stated:

“The weight of authority seems to be in accord with this opinion,” citing many cases.

In *re Boles' Estate* (Sup. Ct., Pa., 1934) 173 Atl. 664, the court said:

“At common law a lunatic was liable in quasi contract for support. * * *

To the same effect was the decision of the same court in *re Walters*, 123 Atl. 408.

In the case of *Palmer, et al., v. Hudson River State Hospital* (Kan., 1900) 61 P. 506, the court said:

“In the first place, it is contended that there must have been an express contract between the hospital and the insane person, or her guardian, to make her estate liable for her necessary maintenance and care. We do not so understand the law. On the contrary, the estate of an insane person is liable for necessities furnished him upon an implied contract.”

In *Kaiser v. State* (Kan., 1909) 102 P. 454, the court said:

“Whether in the absence of a statute the estate of an insane person is chargeable with the expense of his maintenance at a public institution is a question upon which there is some conflict in the authorities. * * * Such liability is denied in these cases: *Montgomery Co. v. Gupton* * * * (Mo.), 39 S.W. 447, 40, S.W. 1094; *Oneida Co. v. Bartholomew*, * * * 31 N.Y. Supp. 106, affirmed * * * 46 N.E. 1150; *State v. Colligan* * * * (Iowa) 104 N.W. 905. These cases have a contrary tendency: *McNairy Co. v. McCoin* * * * (Ill.) 63 N.E. 1011; *Palmer v. Hospital* * * * (Kan.) 61 Pac. 506.” [9]

In *State ex rel Hilton v. Probate Court, etc.*, (Minn. 1919) 171 N.W. 928, the court said:

“Whether, in the absence of a statute, the estate of an insane person is chargeable with his maintenance at a public institution, is a

question upon which there is a diversity of judicial opinion. * * * However, we are not greatly concerned with the rule applicable in the absence of a statute, in view of the history of the legislation of the past 45 years upon the subject under consideration.”

In *re Idleman's Commitment; Idleman v. State*; (Ore., 1933) 27 P. (2d) 305, the court said:

“Some courts declare that those who possess estates ought not expect the public to support them free of charge in the state hospitals, and have allowed judgment against the estates of the inmates, even in the absence of statutes.”

In *Luder's Adm'r v. State* (Tex. App., 1912) 152 S.W. 220, it was held, as set forth in the syllabus:

“The remedy prescribed by Rev. St. 1895, art. 116, for the reimbursement by the state of expenses for maintaining patients in insane asylums, is not exclusive, and does not affect the common-law right of the state to recover for money expended in the care of a demented person against his guardian or other person liable for his support, based on implied duty to pay for the benefits received without reference to the lunacy proceedings, and the common-law remedy is unaffected by the fact that the lunatic is dead, and an action may be maintained against his administrator.”

(Note contrary opinion, *Wiseman v. State* (Tex. App. 1936) 94 S.W. (2d) 265.)

In *Board of Chosen Freeholders of Camden County v. Ritson* (N.J., 1903) 54 Atl. 839, where the New Jersey statute provided that the insane person and his estate should be liable for the expense of his care in the county hospital, the court said:

“This statute in that regard is but declaring of that which was a fact at common law, * * *.”

Where a municipality or county is by statute vested with a sovereign's duty, it is subject to the same rules and rights (unless the statute provides otherwise) with reference to that duty that the sovereign would be if it had performed the duty.

In *re Erny's Estate* (Sup. Ct. Penn., 1940) 12 Atl. (2d) 333.

III.

In 32 C.J., page 687, sec. 374, it states:

“While there is some dicta to the effect that, under the common law, the estate of a lunatic was liable for his maintenance at public expense (87) * * *, it is generally held that at common law and in the absence of express contract or deception as to the ability to support himself, the public authorities may not recover from the lunatic or his estate the expenses incurred on his account, (93) * * *.”

In note 87 appears only the case of *Board of Chosen Freeholders of Camden County v. Ritson* (N.J.), *supra*.

In 44 C.J.S., page 177, the word “dieta” has been dropped, and it states:

“There is some authority to the effect that, under the common law, the estate of a lunatic was liable for his maintenance at public expense, * * *.”

The cases cited under note 93 and under the same rule in 44 C.J.S., page 178, note 17, when analyzed, give very little support to the rule stated in *Corpus Juris*.

In the case of *Board of Commissioners v. Ristine* (Ind., 1890), 24 N.E. 990, there was an express contract between the guardian and the county commissioners that they should keep an insane person in the county poorhouse. The court held that under the Indiana statutes they had no authority to make such contract. Nothing is stated as to the common law, and, if there is any inferential reference to it, it would be *obiter dictum*.

The following cited cases, to-wit, *Montgomery County v. Gupton* (Mo., 1897), 39 S.W. 447; *Jones County v. Norton* (Iowa, 1894) 60 N.W. 200; *Bremer Co. v. Curtis* (Iowa, 1880) 6 N.W. 135; *State v. Colligan* (Iowa, 1905) 104 N.W. 905; *Oneida County v. Bartholomew* (1894), 31 N.Y.S. 106 erroneously apply the common law rule relative to paupers to cases involving insane persons and [11] negative the right of reimbursement to the public authorities.

Neither the sovereign, nor the county, nor a municipality was at common law required to give care to paupers. 48 C.J., page 432. So any such aid would have been a voluntary gift. On the other hand, the rule as to insane persons was that

the sovereign was required to give such care and was entitled to reimbursement, as set forth in *State v. Ikey's Estate*, supra; also 32 C.J. 626, paragraph 162.

The case of *Brown's Committee v. Western State Hospital* (Va., 1909) 66 S.E. 48, seems to have been decided upon agreement of counsel in court. No study of the authorities on the point is indicated.

In *re Bedford* (Juvenile and Domestic Relations Court of New Jersey, 1933) 168 Atl. 134, the New Jersey statutes clearly covered the whole situation, and the case was decided upon them. Nevertheless, the court cited 32 C.J. section 374, supra, with approval. It was clearly dicta.

In *Wiseman v. State* (Court of Civil Appeals, Texas, 1936) 94 S.W. (2d) 265, Texas had a complete statutory system for the care of the insane, including liability of such persons and their legal representatives for the cost of their care. The court decided the case entirely upon the Texas statutes. Nevertheless, it quoted and cited 32 C.J., section 374, supra, and also 14 R.C.L., page 566, section 18.

Said section 18 of 14 R.C.L. does not support such a holding but merely states there is a conflict of authority and cites one case for and one case against the rule.

When the cases on the subject are analyzed, it appears that the weight of authority is to the effect that at common law the sovereign was entitled to be reimbursed for expenses incurred in caring for the insane. [12]

IV.

Such being the common law, search will be made of the statutes to see if they provide otherwise.

In all of the time mentioned in this case, the statutes of Alaska have provided that insane persons at large should be tried by jury and committed to an asylum for care when found to be really insane (Section 4671, C.L.A., 1933), the asylum to be one with which a contract had been made on behalf of the United States, which was to pay for the cost thereof (section 4676, C.L.A. 1933). No distinction was made between insane paupers and insane people of property, and no provision was made for reimbursing the sovereign for the expense.

It was provided, however, that a guardian could be appointed for the estate of insane persons and that he should apply the income and profits (and under order of court, the principal) to the comfortable and suitable maintenance and support of his ward (section 4528 and 4546, C.L.A., 1933).

By act of congress, approved April 24, 1926, 44 Stat. 322, chapter 177, consisting of two sections, provided that insane persons should deposit their money with the asylum under contract for the care of Alaskan insane and that, if any such property was still so deposited upon their death or elopement and was unclaimed by the insane person or his legal heirs within five years of death or elopement, the money should be covered into the Treasury of the United States. It further provided that, in every instance of death or elopement where money remained in the hands of the asylum, the Secretary

of the Interior should make diligent inquiry as to the whereabouts of the insane person or his legal heirs and thereafter turn over the money to the proper party.

At first reading it would seem that congress did not expect the insane person to owe the United States anything, or it would [13] have provided for such money to be credited upon the debt, if any. However, these same sections appear to the same effect as amended and extended in the act of congress, approved October 14, 1942, 56 Stat. 782, which definitely provides for reimbursement of the United States.

Thus it appears that the failure to provide that moneys received from patients in the asylum should be credited upon any debt owing the United States was not indicative of an intention on the part of the United States to pay all expenses of caring for an inmate without any claim for reimbursement.

By act of congress, approved October 14, 1942, 56 Stat. 782, it was provided in sections 9 and 10 as follows:

“Sec. 9. It shall be the duty of a patient, or his legal representative, spouse, parents, adult children, in that sequence, to pay or contribute to the payment of the charges for the care or treatment of such patient in such manner and proportion as the Secretary may find to be within their ability to pay: Provided, That such charges shall in no case exceed the actual cost of such care and treatment. The order of

the Secretary relating to the payment of charges by persons other than the patient, or his legal representatives shall be prospective in effect and shall relate only to charges to be incurred subsequent to the order: Provided, however, that if any of the above named persons wilfully conceal their ability to pay, such persons shall be ordered to pay, to the extent of their ability, charges accruing during the period of such concealment. The Secretary may cause to be made such investigations as may be necessary to determine such ability to pay, including the requirement of sworn statements of income by such persons.

“Sec. 10. Any acts or parts thereof, in conflict with the provisions hereof are hereby repealed.”

As a statute is to be interpreted as having a prospective effect, unless it clearly appears to have been the intention of the law-making body that it should have a retrospective effect (59 C.J., page 1159), said section will be examined with the rule in view.

The statement that the order of the Secretary as to the payment of charges by persons other than the patient or his legal representatives shall be prospective and relate only to charges to be incurred subsequent to the order infers a different rule as to the patient or his [14] legal representative. However, if we interpret the section to mean that the order of the Secretary relating to charges to be paid by the patient or his legal representative shall be

prospective and retrospective to the effective date of the act, to-wit, October 14, 1942, the inference will be satisfied. As no clear intention on the part of congress to make the section relate to charges arising prior to October 14, 1942, appears, it will be necessary to so interpret said section.

Therefore, said act of congress of October 14, 1942, continued the common law duty of the patient or his legal representative to reimburse the government for the expense in caring for an insane person. It limited the duty of the manner and proportion that the Secretary should find to be with their ability to pay, thus requiring such finding for charges incurred after the passage of that act. It, in no way, affected the common law right to reimbursement existing in the government prior to the act and did not provide any procedure relative thereto.

Consequently, as the plaintiff in this case had a vested right to reimbursement prior to October 14, 1942, and was not required to obtain any finding on the part of the Secretary of the Interior as to the ability of the defendants to pay, the complaint in this case states a cause of action, and the demurrer should be overruled.

Done at Fairbanks, Alaska, this 31st day of October, 1945.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Filed Oct. 31, 1945. [15]

[Title of District Court and Cause.]

AMENDED ANSWER

Comes Now the Defendants and for answer to Complaint of Plaintiff on file herein allege and admit as follows:

I.

Admits Paragraphs I, II, III, and V of said Complaint.

II.

Answering Paragraph IV of said Complaint the defendants allege that they have no information or knowledge sufficient to form a belief as to whether or not between the 10th day of August, 1927, and the 13th day of October, 1942, the Plaintiff expended the total sum of nine thousand one hundred eighty dollars and eleven cents (\$9,180.11), or any other sum for the care or maintenance of defendant, George Gartner, at Morningside Hospital, at Portland, Oregon, and based upon such want of knowledge or belief they therefore deny the same. Deny tiff in the sum of nine thousand one hundred eighty dollars and eleven cents (\$9,180.11) or any other sum, is the reasonable cost of the care or maintenance of said defendant, George Gartner, at said hospital during said period. Deny that said defendant, George Gartner, is justly indebted to the plaintiff in the sum of nine thousand one hundred eighty dollars and eleven cents (\$9,180.11), or any [16] other sum.

And the defendants for a further and separate answer, and as their first affirmative defense allege:

I.

That during all of the time mentioned in the Complaint, plaintiff by Congressional acts appropriated monies annually for the care and maintenance of insane persons who were adjudged to be insane, and ordered by reason thereof, to be committed to the Morningside Hospital at Portland, Oregon, by the Courts of Alaska. That said appropriations were made as a gratuity and charity and without any thought or expectation upon the part of Congress or plaintiff that any part thereof was to be repaid to plaintiff by said insane person or his legal representative. That ever since the "Act of May 17, 1884, providing for the Civil Government of Alaska" (23 Stats. 24), and up until the Act of Congress of October 14, 1942 (56 Stat. 782), relating to the care and maintenance of insane persons, in Alaska, plaintiff never requested or made any demand, upon any insane person or his legal representative, for reimbursement for any monies that may have been expended by plaintiff for the care and maintenance of insane persons pursuant to the Acts of Congress. That by its acquiescence from the year of 1884 to the year of 1942 in said policy the plaintiff should not now be permitted to assert that monies expended by it as a gratuity and as a charity should be recovered from insane persons, their legal representatives, or relatives.

And the defendants, for a further and separate answer, and as their second affirmative defense, allege:

I.

That this cause was filed on the 24th day of August, 1945, and summons was issued by this Court on the 24th day of August, 1945. That the plaintiff did not commence this action within the time limited by law for the recovery of sums expended by it prior to the 24th day of August, 1939, and that all sums expended by plaintiff between the 10th day of [17] August, 1927, and the 24th day of August, 1939, are barred by the statute of limitations in effect in the Territory of Alaska.

Wherefore, defendants pray that plaintiff take nothing by this action, and that they have judgment for their costs and disbursements herein.

JOHN L. McGINN,
COLLINS & CLASBY,
By CHAS. J. CLASBY,
Attorneys for Defendants.

United States of America,
Territory of Alaska—ss.

Mike Erceg, being first duly sworn, on oath deposes and says:

That he is one of the defendants in the above entitled action and has read the foregoing Answer and the same is true as he verily believes.

MIKE ERCEG.

Subscribed and sworn to before me this 17th day of December, 1945.

[Seal] CHAS. J. CLASBY,
Notary Public in and for the Territory of Alaska.

My commission expires April 20, 1948.

Copy received this 17th day of December, 1945.

HARRY O. AREND,
United States Attorney.

[Endorsed]: Filed Dec. 18, 1945. [18]

[Title of District Court and Cause.]

DEMURRER

Comes now the plaintiff above named and demurs to the first and second affirmative defenses contained in the defendants' Amended Answer herein for the reason that said two affirmative defenses, and each of them, do not state facts sufficient to constitute defenses to the plaintiff's complaint on file herein.

Dated at Fairbanks, Alaska, this 6th day of February, 1946.

HARRY O. AREND,
United States Attorney.

Service of the foregoing Demurrer by receipt of copy thereof this 6th day of February, 1946, is hereby acknowledged.

CHAS. J. CLASBY,
Of Counsel for Defendants.

[Endorsed]: Filed March 1, 1946. [19]

[Title of District Court and Cause.]

ORDER

The Court having heard arguments by respective counsel in this cause on the plaintiff's demurrer to the Amended Answer on March 21, 1946, and having taken the matter under advisement and now being fully advised in the premises, it was Ordered that the Demurrer be sustained as to each of the affirmative defenses.

March 26, 1946.

Entered in Court Journal No. 33, Page 314. [20]

[Title of District Court and Cause.]

SECOND AMENDED ANSWER

Comes Now the Defendants and for their second amended answer to Complaint of Plaintiff on file herein allege and admit as follows:

I.

Admits Paragraphs I, II, III, and V of said Complaint.

II.

Answering Paragraph IV of said Complaint the defendants allege that they have no information or knowledge sufficient to form a belief as to whether or not between the 10th day of August, 1927, and the 13th day of October, 1942, the plaintiff expended the total sum of nine thousand one hundred eighty dollars and eleven cents (\$9,180.11), or any other sum for the care or maintenance of defendant,

George Gartner, at Morningside Hospital, at Portland, Oregon, and based upon such want of knowledge or belief they therefore deny the same. Deny that said sum of nine thousand one hundred eighty dollars and eleven cents (\$9,180.11) or any other sum is the reasonable cost of the care or maintenance of said defendant, George Gartner, at said hospital during said period. Deny that said defendant, George Gartner, is justly indebted to the plaintiff in the sum of nine thousand one hundred eighty dollars and eleven cents (\$9,180.11), or any other sum. [21]

Wherefore, defendants pray that plaintiff take nothing by this action, and that they have judgment for their costs and disbursements therein.

JOHN L. McGINN,

COLLINS & CLASBY,

By CHAS. J. CLASBY,

Attorneys for Defendants.

United States of America,

Territory of Alaska—ss.

Mike Erceg, being first duly sworn, on oath deposes and says:

That he is one of the defendants in the above entitled action and has read the foregoing Second Amended Answer and the same is true as he verily believes.

MIKE ERCEG.

Subscribed and sworn to before me this 29th day of April, 1946.

CHAS. J. CLASBY,

Notary Public in and for the Territory of Alaska.

My commission expires April 20, 1948.

Copy received this 29th day of April, 1946.

HARRY O. AREND,

United States Attorney.

[Endorsed]: Filed April 29, 1946. [22]

In the District Court for the Territory of Alaska

Fourth Judicial Division

No. 5368

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE GARTNER, an Insane Person, and

MIKE ERCEG, Guardian of the Estate of

George Gartner, an Insane Person,

Defendants.

VERDICT

We, the Jury, duly empaneled and sworn to try the above-entitled case, do, from the law and the evidence therein, find the issues joined therein in favor of the plaintiff and against the defendants and that the defendants are indebted to the plaintiff

for the matters set forth in the complaint herein in the sum of \$9180.11, due October 13, 1942.

Done at Fairbanks, Alaska, this 20th day of November, 1946.

B. B. GREEN,

Foreman.

Nov. 20, 1946. Entered in Court Journal No. 34, Page 253.

[Endorsed]: Filed Nov. 20, 1946. [23]

In the District Court for the Territory of Alaska

Fourth Judicial Division

No. 5368

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE GARTNER, an Insane Person, and
MIKE ERCEG, Guardian of the Estate of
George Gartner, an Insane Person,
Defendants.

JUDGMENT

The above entitled cause came on regularly for trial on the 20th day of November, 1946, before the Court sitting with a jury, the plaintiff appearing by and through Harry O. Arend, United States Attorney, and Wm. E. Berrett, Assistant United States Attorney, the defendants appearing by and through

their attorney, Chas. J. Clasby, and the defendant, Mike Erceg, having also appeared in proper person; and evidence having been introduced by both parties, the case argued, and the jury instructed by the Court, and the jury having thereupon rendered the following verdict, to-wit:

“We, the Jury, duly empaneled and sworn to try the above-entitled case, do, from the law and the evidence therein, find the issues joined therein in favor of the plaintiff and against the defendants and that the defendants are indebted to the plaintiff for the matters set forth in the complaint herein in the sum of \$9180.11, due October 13, 1942.

Done at Fairbanks, Alaska, this 20th day of November, 1946.

B. B. GREEN,
Foreman.”

Whereupon, by virtue of the law and by reason of the evidence aforesaid,

It is Ordered, Adjudged and Decreed that the plaintiff do have and recover of and from the defendant George Gartner and from the defendant Mike Erceg as Guardian of the Estate of George Gartner, an insane person, the sum of nine thousand one hundred eighty and 11/100 dollars (\$9,180.11), with interest at the [24] rate of six per cent (6%) per annum from the date hereof until paid, together with plaintiff's costs herein in the sum of \$83.00 to be taxed by the Clerk of this Court.

Let execution issue accordingly.

Done at Fairbanks, Alaska, this 6th day of December, 1946.

/s/ HARRY E. PRATT,
District Judge.

Service of the foregoing Judgment by receipt of a copy is hereby admitted this 5th day of December, 1946.

/s/ CHAS. J. CLASBY,
Of Counsel for Defendants.

Dec. 6, 1946. Entered in Court Journal No. 34,
Pages 291-292.

[Endorsed]: Lodged and filed Dec. 6, 1946. [25]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS

Harry O. Arend, United States Attorney, and William E. Berrett, Assistant United States Attorney, both of Fairbanks, Alaska, attorneys for the plaintiff.

John L. McGinn and Collins & Clasby, of Fairbanks, Alaska, attorneys for the defendants.

The above cause came on regularly for trial at ten o'clock a. m., Wednesday, November 20, 1946, before the Honorable Harry E. Pratt, Judge of the above-entitled court, at Fairbanks, Alaska, and the following is the transcript of the testimony given and the proceedings had therein.

The attorneys present at the trial of said cause were: Harry O. Arend and William E. Berrett for the plaintiff; Charles J. Clasby of Collins & Clasby for the defendants. [26]

The Court: Are counsel ready to proceed with the trial of United States against George Gartner, an Insane Person, and Mike Erceg, Guardian of the Estate of George Gartner, an insane person?

Mr. Clasby: The defendant is ready.

Mr. Arend: The plaintiff is ready.

(Thereupon the jury was duly empaneled and sworn, and the following proceedings were had:)

JOHN LEROY HASKINS

called as a witness on behalf of the plaintiff, having been first duly sworn by the Clerk of the Court, testified as follows:

Direct Examination

By Mr. Arend:

Q. Will you state your full name, please?

A. John LeRoy Haskins.

Q. Where do you reside?

A. Portland, Oregon.

Q. How long have you resided there?

A. Oh, ten years and five—six—five months, I think.

Q. Are you a practicing physician and surgeon in any state?

(Testimony of John LeRoy Haskins.)

A. I have a license in several states.

Q. What has been your medical education and premedical education?

A. Well, I had my college education at Carleton College in Northfield, [28] Minnesota; graduated from the University of Minnesota Medical School; internship, University Hospital, Minneapolis; four years in the United States Army in the medical corps and discharged with the rank of Major. After being discharged from the army, I went back to the University of Minnesota for some graduate work in medicine. I was in general practice of medicine from '21 to '28, general practice of medicine. In 1928 I went to New York on the staff of King's Park State Hospital there. I remained there in the New York state service until 1936, except for part of a year when I did graduate work at the University of Columbia in psychiatry. In 1936 I went to Morningside Hospital as medical supervisor on civil service appointment, after taking a competitive civil service examination. I have been there since that time.

Q. What degrees do you hold?

A. Bachelor of Science and Doctor of Medicine.

Q. Are you both a licensed physician and surgeon?

A. Well, your M.D. license gives you the right to practice either.

Q. Have you practiced both?

A. I have done some surgery, yes, but for the past eighteen years I have done nothing but psychiatry.

(Testimony of John LeRoy Haskins.)

Q. What hospital connections do you have at the present time?

A. I am on the teaching staff at the Oregon University. We teach psychiatry at the University of Oregon Medical School, and that [29] places you on the staff of the hospitals connected with the University in Portland. There are several hospitals there that are connected with the University.

Q. Do you belong to any medical associations?

A. I belong to the American Medical, the American Psychiatry, the North Pacific Neuropsychiatric, the Oregon Neuropsychiatric Association, of which I have been president. I am on the Board of Directors of the North Pacific Neuropsychiatric. I have been president of the Oregon Mental Hygiene Society.

Q. In what line of work do you specialize, if any?

A. Psychiatry.

Q. Psychiatry. How long have you so specialized?

A. I have done nothing but psychiatry and hospital administration since 1928.

Q. How long have you been at Morningside Hospital?

A. I went there in July, I believe, 1936.

Q. Who operates Morningside Hospital?

A. Morningside Hospital is owned by the Sanitarium Company and it is leased—or, it is under contract with the Division of Territories and Island Possessions of the Department of the Interior to

(Testimony of John LeRoy Haskins.)

care for regularly committed mentally ill patients from Alaska.

Q. How many official patients have you from Alaska? A. About 360 at the present time.

Q. Do you take any others than from Alaska?

A. We take public health service cases; that is, there is no mental hospital for patients of the United States Public Health Service in that area, and we take a few emergency cases for the Public Health Service, and we always have several there—sometimes six or seven, sometimes fewer. We have had a few female veterans; that is, there was no veterans' hospital in the area where women patients could be taken care of, and we have taken care of one or two as an accommodation for the Veterans' Bureau.

Q. About how many do you have now? The total number? A. We have 365 patients.

Q. How many of those are from Alaska?

A. Around 358 or 359.

Q. Are you personally familiar with all of the cases?

A. Yes. I am familiar with every patient in the hospital. I have interviewed them all at intervals. I see every patient practically every day. In a small group like that you can do that: see every patient every day.

Q. Doctor, how is the hospital staffed?

A. My position there is as the medical director, and I am employed by the Department of the In-

(Testimony of John LeRoy Haskins.)

terior. The rest of the staff—the other doctor, a full-time man, is employed by the Sanitarium Company, and the two internes are employed by the Sanitarium Company.

Q. How many employees are there? [31]

A. You mean employees of all kinds?

Q. Yes, employees of all kinds.

A. I think somewhere around seventy-five.

Q. How many rooms and wards are there in the hospital?

A. Well, there are two large male wards; there is a male parole ward, a male tubercular ward, a male infirmary ward; and then there is the acute female ward, chronic female ward, female tuberculosis ward, female infirmary. We are opening a new building for about fifty, which should be opened this month sometime if we have any luck on supplies.

Q. How many patients can you handle comfortably?

A. We could handle about 375. At the present time we have ten or twelve patients there, who are ready for release, because of the shipping strike.

Q. Will you state to the jury what type of care is provided for the patients of the Morningside Hospital?

A. Well, take when the new patient comes in, this patient is examined, a physical examination which includes ordinary blood tests and X-Ray of the chest. We X-Ray all of the chests of these natives, particularly the natives because we have a very high incident of tuberculosis; about thirty per

(Testimony of John LeRoy Haskins.)

cent of the natives have tuberculosis. We give a careful physical examination and X-Ray of any other special thing which is needed—blood, spinal fluid, Wassermanns. Then there is a mental examination which might last a considerable length of time. We [32] get all of the history we can from the nurse so that we can get the background of the person when he comes in to help in our diagnosis. This routine may take a week or two, depending on any special examination which may be needed by the ward. Their meals are served—Those persons who are up and about go to a cafeteria where they have their meals. Then if there is no counter-indication, the patient goes to the occupational therapy shop. These shops are staffed by trained people who attempt to get the patients to interest themselves in something, in something outside of their own delusional formation. They try to get them interested in doing something there in the shop. They try to get them interested in doing something there in the shop. They may have weaving or wood carving or carpenter work or pottery work, or anything that seems to be fitted for them. They go to the shop five days a week, afternoon and morning. Then we attempt to do something along the lines of recreation. We have Wednesday afternoon as moving picture day. The patients go to the movies on Wednesday afternoon and Wednesday night. Friday afternoon is dance afternoon for all the patients who are able to go to a dance. Sundays and Saturdays is

(Testimony of John LeRoy Haskins.)

church service class; we have about four or five denominations represented. Then during the summer we have various outside activities and games. We have special parties on Christmas, Thanksgiving, and Halloween, and those times we try to make the situation as near that of a home environment [33] as we can in trying to get away from the idea of the asylum idea, because they are sick; they are sick mentally and not physically. Then if there are any special types of treatment which are indicated, we use those; that is, we use the shock treatment; then the insulin shot, which is a complicated procedure which we have been the first hospital on the west coast to use, in 1937. Then we may use several other types of particular treatment. The idea is to get as many patients out of the hospital as we can. We don't want to keep them there. It isn't good for them, or not good for anyone else. We try to get them back into circulation in as good shape as we can.

Q. Who provides the clothing for the inmates?

A. The clothing is provided for the inmates by the Sanitarium Company. The contract which the Sanitarium Company makes specifies that the Sanitarium Company furnish everything for the patient: clothing, medical supplies, dental work, sufficient recreational facilities. Everything is provided by the Sanitarium Company under the contract.

Q. How many meals a day are the patients allowed?

(Testimony of John LeRoy Haskins.)

A. The ordinary patients in the wards have three meals a day. Those patients in the infirmary ward or the old ward have extra egg-nogs, extra meals, and extra food as indicated. Any special diets which we want to provide are given.

Q. Are you familiar with any other mental hospitals; that is, [34] the care and maintenance provided and the cost?

A. Yes. I have visited mental hospitals from as far east as Boston, Massachusetts, to Southern California, and a lot of points between. I have been at many government hospitals such as Saint Elizabeth's and veterans' hospitals.

Q. How long have you known of Morningside Hospital by actually being there or by repute?

A. I knew about it a year and a half or two years before I went there.

Q. How has it ranked with other institutions of a similar type throughout the country?

Mr. Clasby: To which we object, if the Court please. It has no bearing on the issues in this case.

The Court: Objection overruled.

Q. Just answer the question.

A. Well, we believe that our discharge ratio of admissions—that is, the number of patients discharged as compared with the number of patients admitted ranks as well up with any other hospitals, and our death rates are quite low.

Q. How does the care and maintenance furnished at Morningside compare with other mental hospitals?

(Testimony of John LeRoy Haskins.)

Mr. Clasby: We address the same objection to that question.

The Court: Objection overruled.

Q. You may answer the question. [35]

A. We believe that our—we know that our food—the patients—the food the patients have there is better than the average mental hospital. We very often have attendants or nurses tell us that the food that the patient gets there is better than the staff food in most hospitals. We believe that the care is—Our number of attendants to the patients is much higher than the average for the United States; that is, we have more attendants. You rate your number of attendants, having so many patients to each attendant. For instance, you would say we had three hundred patients and you had fifty attendants, you would have one attendant for six patients. We usually run one to five. We find many in the States run one to sixteen, one to eighteen, one to twenty. The proportion of attendants is higher, which we believe gives better care.

Q. Dr. Haskins, do you have anything to do with arriving at a contract figure between the Sanitarium Company—just yes or no—and the government?

A. No, except that the thing was shown to me before it was—That is arrived at by those bids. For instance, we will say the contract was up——

Mr. Clasby (Interposing): We object to the witness answering something that hasn't been asked him. He has already answered the question.

(Testimony of John LeRoy Haskins.)

The Court: Very well. Sustained.

Q. Are you familiar with Saint Elizabeth's Hospital? A. Yes. [36]

Q. Where is that located?

A. Right outside of Washington, across the Potomac River, at Washington, D. C.

Q. What type of hospital is it?

A. It functions as the mental hospital for the District of Columbia. They also have had in there a fair percentage of army and navy personnel, but the principal function is a mental hospital for the District of Columbia and Washington, D. C.

Q. Are you familiar with the veterans' hospitals throughout the country? A. Yes.

Q. And have you compared—are you familiar with the per capita costs at Saint Elizabeth's and the veterans' hospitals? A. Yes.

Q. Are you familiar with the comparative costs for care and maintenance at Saint Elizabeth's Hospital as far back as 1927?

A. Yes, I think we have those reports. The Bureau of Census——

Mr. Clasby (Interposing): Just answer the question.

Mr. Arend: Just answer the question "yes" or "no".

A. Yes.

Q. Can you say the same for the veterans' hospitals? Yes or no. A. Not for all years.

Q. For what years are you familiar? [37]

A. Well, I have the exact cost for several of the

(Testimony of John LeRoy Haskins.)

recent years and the approximate cost for a number of years before that.

Q. Are you acquainted with George Gartner?

A. Yes.

Q. How long have you known him?

A. I have known George since July, 1936.

Q. How many interviews have you had with him during that time, approximately?

A. I don't remember how many interviews, formal interviews—a great many, and you see him practically day after day in the wards so that you would know his condition.

Q. You know his mental condition?

A. Well, yes.

Q. Over the ten-year period?

A. That is my job: to know the mental condition of the patients.

Q. Are you familiar with the type of care and maintenance that he has received at Morningside Hospital while you have been there?

A. Yes.

Q. Are you familiar with his case history from 1927? A. Fairly familiar, yes.

Q. You are familiar with the fact that he came to Morningside in August, 1927? A. Yes.

Q. And he is there now? A. Yes. [38]

Q. He has been there continuously?

A. He was there continuously. I think he has been there ever since.

Q. Has he been there continuously since August, 1927?

(Testimony of John LeRoy Haskins.)

A. Yes. According to the records, he has been there continuously during that period.

Q. Now, Dr. Haskins, I would like to have you state to the jury what, in your opinion, was the reasonable value of the care and maintenance provided Mr. George Gartner at Morningside Hospital, on a monthly basis, per month during 1927?

Mr. Clasby: To which we object, if the Court please, for several reasons. The first, this witness was not present at the hospital in 1927 and has no personal knowledge of the services that were then performed for George Gartner. This witness was not then a member of the staff of the Sanitarium Company and has no knowledge of what it cost the Sanitarium Company to supply those services or what the reasonable value of those services were. This witness has further testified that at that time he was in New York—or, no—he was in the general practice of medicine. He was not even connected with psychiatry or had any knowledge of hospitals for insane patients.

The Court: We will take a recess at this time.

(A ten minute recess was taken, after which court was duly reconvened.) [39]

The Court: Will counsel stipulate that all members of the jury are present?

Mr. Arend: We stipulate.

Mr. Clasby: We so stipulate.

The Court: Read the last question, please.

(The last question was read by the reporter.)

(Testimony of John LeRoy Haskins.)

The Court: All right. Objection overruled.

Mr. Arend: Will you answer?

A. About \$52.00 a month.

Q. Will you give us your answer to the same question for the year 1928?

Mr. Clasby: Just a moment. To which we interpose the same objection, if the Court please. The witness' testimony shows in 1928 he was in private practice; he had no familiarity with this institution or this patient or costs at psychiatric institutions. It hasn't been shown that he has any records or information available to him from which to form an opinion as to the cost in 1928, the same as our objection to the year 1927. There is other and better evidence that can be produced to establish that cost, and that is the record of the sanitarium itself.

The Court: Objection overruled.

A. \$52.00 a month.

Q. And will you answer the question with reference to the year 1929? [40]

A. \$52.00 a month.

Mr. Clasby: We, if the Court please, would like to have the record show an objection to all questions of this kind up to the year 1936.

The Court: Very well. The same ruling to the objections.

Q. For 1930?

A. 1930. At that time food prices were somewhat lower.

Mr. Clasby: We object to comments by the witness.

(Testimony of John LeRoy Haskins.)

Mr. Arend: Yes. You can just state——

A. (Interposing): \$47.00.

Q. 1931? A. \$47.00.

Q. 1932? A. \$47.00.

Q. 1933? A. \$47.00.

Q. 1934? A. \$47.00.

Q. 1935? A. \$47.00.

Q. 1936? A. \$50.00.

Q. 1937? A. \$50.00.

Q. 1938? [41] A. \$54.00.

Q. 1939? A. \$54.00.

Q. 1940? A. \$54.00.

Q. 1941? A. \$54.00.

Q. 1942?

Mr. Clasby: To October 13th.

A. \$54.00.

Mr. Arend: You may cross-examine.

Cross-Examination

By Mr. Clasby:

Q. You stated, Doctor, on your direct examination, if I recall properly, that you are a civil service employee. Is that correct?

A. That is correct.

Q. By whom is your salary paid?

A. United States Government, Department of the Interior.

Q. No part of it is paid by the Morningside Hospital? A. None.

Q. Or by the Sanitarium Company?

A. No.

(Testimony of John LeRoy Haskins.)

Q. I understand that during the years 1927 to 1942 there was a contractual arrangement between the United States Government [42] and the Sanitarium Company. Is that correct?

A. That's right. It is still a contract affair. The contract was renewed in——

Q. (Interposing): Well, what I am driving at, it is a contract with the Sanitarium Company?

A. Yes. It is a contract between the government and the Sanitarium Company.

Q. Is that a corporation? A. It is.

Q. A stock corporation?

A. It is a family affair. It was taken over by—it was originally owned by Dr. Coe. At the time of his death, it became part of the estate, and it was made a corporation at that time.

Q. Does that corporation own the properties known as the Morningside Hospital?

A. They do.

Q. Does it own any other properties?

A. Not that I know of, the company itself.

Q. And does the corporation have any arrangement with the hospital for the care of these insane persons?

A. Well, the Sanitarium Company owns the hospital.

Q. Does it operate it? A. It operates it.

Q. I see. It operates it.

A. The Sanitarium Company hires all of the employees and everyone [43] in connection with the institution except myself.

(Testimony of John LeRoy Haskins.)

Q. By the way, are you on the board of directors of the Sanitarium Company?

A. I am not.

Q. Are you a stockholder in the Sanitarium Company? A. I am not.

Q. I believe you said they had about seventy-five employees?

A. Yes. It varies some. It is sometimes more.

Q. Let's see. There was one doctor and two internes? A. Two internes. That's right.

Q. How many on the nursing staff?

A. You mean attendants and nurses?

Q. No. I mean just nurses for persons who are physically ill.

A. Anywhere from two to six or eight, depending on how many we can get.

Q. How many in your cooking or culinary department?

A. Oh, we have a chief—we have a cook, assistants—two assistants—and a baker. That is full time, and then we have relief for them.

Q. How many on what you call a guard staff?

A. We don't call them guards. Do you mean attendants?

Q. Attendants, yes.

A. On the attendant staff, we run about one to each eight patients; something like that.

Q. Then there would be about thirty-five or forty of those? [44]

A. Thirty-five or forty, yes.

(Testimony of John LeRoy Haskins.)

Q. Then what other permanent staff do you have?

A. Well, there is the mechanical staff and the herdsman taking care of the cattle.

Q. How many on the mechanical staff?

A. That varies, depending on whether we are having any new construction or not.

Q. No. I mean your permanent building maintenance staff.

A. The permanent building staff would be two or three—two.

Q. You spoke of a gardener or herdsman.

A. Yes, a herdsman, one man in charge of the cows, a herdsman.

Q. How many do you have in charge of your gardens?

A. That depends on the time of the year. In the wintertime there might be one gardener, and in the summertime there might be several.

Q. You have one on your permanent staff, though?

A. Yes, one man as a gardner.

Q. I take it then there are a number of acres to the grounds?

A. Well, it is sixty acres or better.

Q. How many head of cattle do you maintain?

A. Well, I think we have around sixteen cows, I think at the present time. I mean I don't keep track of all they have.

Q. Enough for the wants of the sanitarium?

A. What?

(Testimony of John LeRoy Haskins.)

Q. Enough for the wants of the sanitarium?

A. Not always. They sometimes have to buy milk. Sometimes they don't. Sometimes they have enough; sometimes they have to buy it.

Q. Do you maintain a vegetable garden?

A. Yes.

Q. Do you raise grain for the cows?

A. No grain. We have pastures for the cows. We don't raise grain.

Q. Chickens?

A. No chickens. We have small orchards.

Q. Small orchards. And you have flower gardens and lawns and that kind of thing, I presume?

A. Yes.

Q. You spoke of there being a pretty high percentage of tuberculosis at the Sanitarium?

A. Yes. Well, that is, about thirty per cent of the native admissions—that is Alaska natives admitted—have either chronic or X-ray evidence of tuberculosis on admission.

Q. Are they segregated?

A. We have a male tuberculosis ward and female tuberculosis ward where they are segregated away from the others, yes.

Q. And who is the person that directly operates the hospital?

A. You mean coordinates the plan of operation of the thing?

Q. The one that is the supervisor of the whole thing, from the gardens on through to buildings and maintenance. [46]

A. Mr. Coe.

Q. Mr. Coe?

(Testimony of John LeRoy Haskins.)

A. Mr. Coe is the president of the Sanitarium Company. His office is there at the hospital.

Q. Now, are you familiar with the costs——

A. (Interposing): I am familiar with the——

Q. ——from 1936 to 1942 to the Sanitarium Company for keeping patients?

A. Not—Well, I am familiar with the cost of some years, certainly, the way they have been broken down and the other costs. The thing has been fairly well checked up, I think, by various sources.

Q. I mean are you familiar with them?

A. I have the determination in every year of the costs.

Q. Do those costs pass through your office and are they subjected to your scrutiny?

A. The costs of the Sanitarium Company—The Sanitarium Company is under contract to the government.

Q. I understand that.

A. My business is to see that they get what we believe is necessary for them.

Q. I understand that also from your testimony, Doctor, but my question is: Have you that familiarity with the corporation's records that you know what it cost them to maintain the patients? [47]

A. In some years I have, yes.

Q. What years?

A. I think the later, more recent years, '44 and '45 and some of the back years. I am not particu-

(Testimony of John LeRoy Haskins.)

larly interested in the costs of the Sanitarium Company——

Q. (Interposing): Listen, Doctor. If you will confine yourself to my questions, we would probably get at the point much quicker. Now, I take it you have no familiarity with the corporation records of the costs of caring for and maintaining patients in that hospital prior to the year 1942. Is that correct?

A. Except that I saw the reports from two or three years back.

Q. That is, I take it——

A. (Interposing): No, I beg your pardon. I saw the reports in '36, '37, and '38, as they were put on the Bureau of Census reports by the Sanitarium Company.

Q. That is the reports that the Company renders to whom?

A. Bureau of Census, for the patients in mental institutions, a pamphlet put out by the Department, in which they must show the cost of maintaining the patients during that time.

Q. What was the profit that showed during those years?

A. I think about five per cent.

Q. Five per cent of what?

A. Five per cent of their——

Q. (Interposing): Investment? [48]

A. No. Five per cent—five per cent on their contract, not on their investment, because their investment there is—the company plant is a large investment; it wouldn't show that.

(Testimony of John LeRoy Haskins.)

Q. Then I take it, from what you said, the stockholders made a five per cent profit on the contract?

A. Some years. Some years. There were one or two years, I think, their report indicated they had lost money; that is before the contract was renewed.

Q. And your sole information in that regard is from reports by the Sanitarium Company to the Bureau of Census?

A. Yes.

Q. You stated that you are familiar with George Gartner?

A. Yes.

Q. And does the hospital staff keep a clinic record on each patient?

A. Yes, very definitely.

Q. Was there one kept on George Gartner?

A. There was.

Q. Do you have that with you?

A. I haven't it with me, no.

Q. Are you familiar enough with it so that you can recall and testify about it?

A. I can.

Q. From 1936 to 1942, generally, what was his mental condition?

A. He is a case of dementia praecox, and he has shown considerable [49] mental regression; that is, he is delusional, and, while he is in good contact and knows people and knows where he is, his age, and all those details, he is a delusional patient. A patient who has been in the hospital, now, for that length of time, from 1927, you do not expect very much improvement in that type of patient, over that length of period. If these patients recover, they recover within a year or fifteen months from when they go in.

(Testimony of John LeRoy Haskins.)

Q. Does the clinic record, from your memory, show any serious illness during the time he has been confined in the hospital?

A. He had a cardiac condition about five years ago.

Q. About five years ago?

A. About that, yes. He had a severe heart attack, and since that time he has been kept rather quiet. He was in bed for quite a while.

Q. Does the clinic record, to your memory, show anything prior to that in the nature of physical ailments?

A. There is nothing striking in his physical case, no.

Q. Is his mental condition, or was his mental condition, at any times you know of and as you gathered information of it from the clinical record, of a dangerous or anti-social character, insofar as handling him in the hospital is concerned?

A. He is rather sullen at times, rather argumentative, but not dangerous at the present.

Q. If duties were assigned him under proper supervision, he could perform them? [50]

A. Well, he has done nothing for the past five years or more, at least.

Q. Yes, of course. I am referring to prior to the heart attack.

A. Yes, prior to that he did some. He could go out and do some; he could be of some use.

Q. Since the time you have been in the hospital, has there been any policy of having those patients

(Testimony of John LeRoy Haskins.)

that are fit to perform duties around the garden and lawn and barns, and so forth, perform those duties?

Mr. Arend: We object to that question, your Honor. I don't know just what the purpose of the question is. The Doctor has testified that they were, that they are, employing occupational therapy for the patients' benefit, for the good of the patient himself.

Mr. Clasby: I object to an argument at this time to the jury.

The Court: Objection overruled. Do you want the question read, Doctor?

The Witness: Yes.

(The last question was read by the reporter.)

A. Yes. It is part of occupational therapy. If the patient is able to, they are better off outdoors getting exercise than they are in the wards, and they do a certain amount of work in the garden. A great many of them request almost immediately, when they come into the hospital, to get something to do. [51] "I want to get out; I want to get some exercise." And when they do that, they are better off doing something.

Q. Prior to having this attack four or five years ago, did Gartner busy himself in those activities a good deal of the time? A. Yes, he did some.

Q. Are you familiar to any extent with the extent of such occupations by him?

A. Since I have been there, he has had no regu-

(Testimony of John LeRoy Haskins.)

lar detail. He had been out with the garden squad part of the time. I believe the records show that at one time he had helped a little bit about the kitchen and sort of in the dining room; he did some work there, I think, at one time.

Q. I don't suppose it is a matter of policy to permit the patients that have tuberculosis to mingle with the others in performing such functions?

A. Tuberculosis patients are all in T.B. wards.

Q. And also, I would presume, those patients that it is difficult to trust, those whose delusions may lead to some violence, are also not permitted to mingle with the others in performing outdoor tasks?

A. You select your patients. You wouldn't trust a patient who would want to run away; we wouldn't put them outside. You certainly wouldn't trust a patient who would threaten violence with tools or anything. [52]

Q. These outside workers, are they supervised?

A. There is an attendant with those constantly.

Q. I believe you testified you maintained about one attendant for about every eight or ten patients?

A. That's right.

Q. What normally, would you say, is the percentage of patients in the hospital that mentally and physically are of such a nature that they can be permitted to perform functions in the dining room and outdoors in your garden and other parts of the premises?

(Testimony of John LeRoy Haskins.)

A. There are a great many patients who might be permitted to do that, but because of special types of therapy, we don't let them. People on shock therapy or occupational therapy on stabilization, we don't put them out to work. The policy is not to take a patient who is under particular treatment of any kind to put them outdoors.

Q. Yes, but on an average, what is your percentage?

A. Oh, I suppose probably fifteen, twenty per cent of the patients are employed in the hospital industry, perhaps less than that.

Q. Now, what special treatments are you familiar with, prior to the heart attack, that were given George Gartner?

A. Well, George had the——

Q. (Interrupting): I mean that you have personal knowledge of.

A. I don't have personal knowledge of all of it. I have seen the clinic record. The policy is when the patient comes into the [53] hospital, a folder is made of the man's case. The outline of the case is put on the front of it as special data on his birth, relatives, guardians, education, qualifications, and church; and in this folder will be his physical examination and Wassermann reports and things of that sort, and the physical will be written up; and starting from that will be the clinic notes; the clinic notes will cover the man's complete physical and will cover what history we have from the commitment papers, what difficulty he was in, and there will be a

(Testimony of John LeRoy Haskins.)

complete write-up of his mental condition at the time he was admitted to the hospital.

Q. I understand that.

A. But following that there will be current notes, which will perhaps cover during the man's first year after admission. There will be at least one full note a month. After that there will be——

Q. (Interposing): Now what do the notes on George Gartner show?

A. George's question was a question of stabilization. At that time shock treatment—we didn't have shock treatment when George came into the hospital, at the time George came in. At the time shock treatment came in George had been in the hospital eight or nine years.

Q. Tell us what treatment was given.

A. Psychiatry therapy. The psychiatrist in charge of the hospital at that time was trying to work out with George an [54] understanding of his difficulties.

Q. What years?

A. That would be '28 . . . '27, '28, '29, and '30 and until you pretty well made up your mind that the man is permanently ill. There was a Public Health officer at that time, a representative of the government who was the man for the United States Public Health Service——

Q. (Interposing): Do you recall the year that the notes show the psychiatrist in charge had a fixed opinion as to Gartner?

A. No, I don't remember that. The notes were

(Testimony of John LeRoy Haskins.)

carried on, continuous notes, at the time I came there, I know, and still are, and he made up his mind probably that the man's delusions were well-fixed probably after a year or so.

Q. And after that it was merely a matter of interview?

A. Interviews to see if there was any change in his mental condition, to see if there was any improvement or any indication that he was rapidly getting worse or any indications for other treatment.

Q. The same sort of observation that your staff, Doctor, would accord the physical condition of the patient?

A. Yes.

Q. Did the Sanitarium corporation try and keep any separate account on individual patients or would they just bulk all of them?

A. They just bulk them. You get one patient who might need a lot [55] of hospitalization and need infirmary nursing all of the time; another patient might need little. You got to bulk them that way.

Q. Now, Doctor, you stated that, in your opinion, the cost of caring for a patient in Morningside Hospital—the reasonable cost of caring for George Gartner in the Morningside Hospital for the year 1927 to January, 1930, was \$52.00 a month?

A. That's right.

Q. On what do you base that?

A. Well, I base it on reports which we have from the United States Public Health Service and

(Testimony of John LeRoy Haskins.)

the physician who was on duty at the institution at that time.

Q. What did he base it on?

A. He based it on what he believed to be adequate care of the patient. They were getting adequate care, and an investigation had shown that that was about equivalent with the care in other hospitals of the same type.

Q. You, at that time, had no knowledge of the care that was given to George Gartner?

A. I am going on his notes, his clinic records, and his observations which are in the hospital now, and his reports to the Department covering those periods.

Q. Well, aren't you largely going on the contract price?

A. If the contract price was a fair—If the contract price was a fair price, and it was, that was the adequate care. [56]

Q. If I recall your testimony properly, Doctor, your testimony coincides exactly with the contract price? . . . A. Well——

Q. Isn't that correct?

A. Yes, we believe that——

Q. (Interposing): Now, wait a minute. And that your testimony as to when the reasonable value of the services rendered George Gartner varied, why the contract varied too? . . . A. Yes.

Q. Now I ask you, isn't your testimony based entirely upon the contract price?

A. What else would it be based on?

(Testimony of John LeRoy Haskins.)

Mr. Clasby: Well, on that basis, if the Court please, we move that this testimony be stricken for the reason that he has admitted it is based on the contract price. There has been no contract introduced in evidence, or any effort made to show what the contract price was, and, of course, we have had no opportunity to address our objection to the introduction of evidence as to a contract price; and, if I may be permitted to argue the relevancy of the contract price at this time, I would like to do so and suggest that it would probably be wise to do so in the absence of the jury.

The Court: We will take that up at two o'clock. It is almost noon now.

Mr. Clasby: If the Court please, I have three [57] instructions I am going to request and, for the convenience of the court and counsel, I will serve them at this time on the government and leave them with the court. There might be some question about that that could be decided at the same time, and I suggest that the jury come back at two-thirty. We could be through with both phases of it.

The Court: We will take an adjournment in a few moments, ladies and gentlemen of the jury, at which time you will be excused until two-thirty. Now the court is going to convene at two o'clock, but you don't have to return until two-thirty. In the meantime remember, don't talk about the case among yourselves or with anybody else until the case is finally submitted to you. The court will be at recess until two o'clock.

(The court duly reconvened at two o'clock P. M., November 20, 1946, and the following proceedings took place:)

The Court: Are you ready to proceed with the argument of your motion?

Mr. Clasby: Yes, if the Court please, but before making the argument on my motion I would like to have the record show that, in submitting requested instruction number three for the convenience of counsel and the court, we did so without waiving any objection that we might have to the admission of the contract price in evidence.

The Court: That is your right any way.

(Whereupon argument was presented by counsel for the defendant and counsel for the plaintiff.) [58]

The Court: I am going to deny the motion. You may put your witness back on the stand and you may clarify what he meant, if he really meant basing his opinion entirely upon that contract.

Mr. Arend: Yes, your Honor.

Mr. Clasby: May I ask, does the Court's ruling embrace the admission of the contract price in evidence?

The Court: Yes.

Mr. Clasby: Then we can consider the stipulation as a part of the evidence?

Mr. Arend: Yes, your Honor, we were going to introduce it and ask to read it to the jury.

The Court: You had better introduce that when the jury is back.

Mr. Clasby: If the Court please, as long as we have twenty minutes at the present time, we might as well utilize it, if the Court doesn't mind taking a matter up out of order. Has the Court had an opportunity to read the requested instructions?

The Court: Yes.

Mr. Clasby: Well, there is a point of defense there that we would like to present and present testimony on, and it would probably be subjected to objection by the United States Attorney and require argument at that time, and, if the Court would care to hear the argument out of order, why we might as well present that. [59]

The Court: Just explain yourself. You have some point that will be brought out later?

Mr. Clasby: We will, first, at the close of plaintiff's case move for a non-suit on the grounds that they haven't in their case established that there have been profits occurring from the estate of Gartner; and, when we put on our defense, we will seek to introduce evidence showing what property Gartner had and the income, if any, there was from that property, and that will be introduced on the theory that the common law—we will seek to introduce it on the theory that the common law provides only for the use of profits derived from an estate.

The Court: You have authorities on that, have you?

Mr. Clasby: Nothing other than the expressions in cases that I can find that indicate what the common law might be.

The Court: I will hear your authorities if you have them.

(Whereupon argument was presented by counsel for the defendant and counsel for the plaintiff.)

The Court: Call the jury.

(Thereupon the jury was called into the courtroom and each juror answered to his or her name, and the following proceedings took place.)

The Court: Are counsel ready to proceed with the trial of this case?

Mr. Clasby: We are, your Honor. [60]

Mr. Arend: Ready.

The Court: Very well. I have overruled the motion of the counsel for the defense. Do you have further cross-examination?

Mr. Clasby: Oh, yes.

JOHN LEROY HASKINS

having been previously sworn, resumed the witness stand for further examination and testified as follows:

Further Cross Examination

By Mr. Clasby:

Q. Doctor, you testified that the government had contracts at various times with the Sanitarium corporation? A. I did.

Q. Within your knowledge, how long has the government had contracts with that organization?

A. Since 1904, I believe.

(Testimony of John LeRoy Haskins.)

Q. Has there been any gap any year, or has that been continuous?

A. Well, it must have been continuous, because there was patients in the hospital that had been there since 1904.

Q. I see. Did you, in your direct examination, testify that the government let that out on bid?

A. It is according to the law. It specifies that it shall be bids, open bids, and the bids must be from an institution west [61] of the main chain of the Rocky Mountains. Any hospital west of the Rocky Mountains may bid on these contracts, and the notification of preparation of bids is published at a time previous to the expiration of the contract and hospitals may bid.

Q. Are there other such hospitals west of the Rockies?

A. Well, this hospital has had the contract continuously since that time, and there have been other bids, I believe, but this hospital has had the contract.

Q. Are there other hospitals west of the Rocky Mountains of the sanitarium character?

A. There are no other good hospitals.

Q. I mean hospitals that could qualify?

A. Yes, there are.

Q. How many?

A. There are no other private institutions that could qualify at the present time. At this time the only thing that could be done would be a state hospital asking for the bid.

(Testimony of John LeRoy Haskins.)

Q. Would the bid of a state hospital, if it was lower, be accepted?

A. If it was reasonable and could guarantee reasonable care, it would have the possibility of being accepted.

Q. Is it the low bid that governs?

A. No, it wouldn't necessarily be the low bid that governs. You would necessarily consider the type of plant they had and the [62] type of care that they could offer.

Q. In the ten years that you have been there, do you know of any particular institution that has bid?

A. I think in 1936—wait a minute—what was that which—in 1936, just before I went there, there was some institution had bid, I believe, some institution in Washington. A private or semi-private institution had bid. I don't know the name of it. Those contracts are let from Washington, D. C. Of course, I don't have anything to do with letting the contract.

Q. Well, do you have knowledge of any other institution having bid since 1935 or 1936?

A. I didn't see any bids, no.

Q. Well, has any information come to you that any others have bid?

A. I have a vague remembrance that in the contract of '38 there was some other bid, but I don't know where it was from. I know no details of the bid.

Q. Are these contracts let each year?

A. No, they are let sometimes—the contract

(Testimony of John LeRoy Haskins.)

in 1930 was evidently a five-year contract; in 1936 and '37 a one year; and then, I think, there was a five-year contract after that.

Q. Do you think that there is any state hospital that the government would let a contract with west of the Rockies that could qualify? [63]

A. Well, if some of them would improve their facilities and improve their number of attendants and some of their other facilities, they might qualify but there would have to be considerable improvement.

Mr. Clasby: I think that is all.

Redirect Examination

By Mr. Arend:

Q. Dr. Haskins, on cross-examination you stated that you considered the government contract with the Sanitarium Company in forming your opinion as to the reasonable cost of the care and maintenance of George Gartner during the years 1927 to 1942. Will you explain that to us? Is that all you considered?

A. Well, no. I saw, a number of years, the expense account and complete return of the Sanitarium Company, as I previously stated, which they had made. These show their actual cost of food, their actual cost of wages and clothing and of heat and light and all those things, and then actually what they had expended. Then we also must consider what other institutions of similar type were spending for care of patients. These other institu-

(Testimony of John LeRoy Haskins.)

tions were not contract institutions; they were institutions that were operating on actual cost, perhaps with a budget; that is, that their budget allowed them to take care of the patients adequately—and other institutions giving adequate, similar adequate care, what their expenses were during that same period. That, I think, should be the basis. [64] That is, if you had two hospitals, each giving good care, you know the actual cost. Now, for instance, Saint Elizabeth's which has actual cost per patient there——

Q. (Interposing): You have testified that you have compared Saint Elizabeth's for several years from 1927 to the present? A. I have.

Q. With the cost of Morningside?

A. Yes, sir.

Q. What did you find in that comparison?

A. I find that the maintenance cost and total cost, for instance, in 1927——

Mr. Clasby (Interposing): We, of course, object to this line of testimony on the grounds that it doesn't have a tendency to establish the value of the services rendered George Gartner.

The Court: Well, he stated that he considered all of that in arriving at what was a reasonable price. I think the objection is good. It will be sustained.

Q. (By Mr. Arend): Are the bids submitted to you that are received for the government?

A. The last two have been. That is, the last two

(Testimony of John LeRoy Haskins.)

I have gone over in consideration of whether there was a difference——

Q. (Interposing): Well, I had better find out which years those were to see if it is relevant.

A. That was in '37—Wait a minute, '38 and in '42. [65]

Q. The 1942 did not go into effect until 1943?

A. 1943, yes.

Q. And for what purpose was the bid submitted to you?

A. Well, the question of whether I believed the bid offered by the Sanitarium Company was a reasonable bid, whether it was too high.

Q. What did you determine in that case?

A. In that case we decided it was too high.

Q. Was it lowered after your determination?

A. It was lowered, yes.

Mr. Arend: No further questions.

Recross Examination

By Mr. Clasby:

Q. I would like to ask the Doctor a few more questions. Doctor, your opinion is the average cost per patient per month?

A. That is the only way you can arrive at it in institution care.

Q. Now, if during these years, the entire group of patients at Morningside had been tubercular, the cost per patient would have been higher, wouldn't it?

A. Well, what I meant by thirty per cent of the

(Testimony of John LeRoy Haskins.)

patients had evidence of tuberculosis didn't necessarily mean that thirty per cent of these patients was active tuberculosis; that is, out of our present population we have at the present time less than twenty patients in bed.

Q. All right. If all of your patients were tubercular, the costs [66] would be higher?

A. Yes.

Q. And if all of the patients required medical attention for physical disabilities, your costs would be higher?

A. If they were in bed in a nursing ward.

Q. And if all of your patients were capable of doing farm work and other labor, your costs would be lower, isn't that correct?

A. Somewhat, yes.

Q. Well, Doctor, they would be appreciably lower, wouldn't they?

A. You are not going to decrease your number of attendants a great deal; you are not going to decrease your recreational facilities; you are not going to decrease your food costs; you are not going to decrease your heat and light.

Q. Just on that one point, why wouldn't you decrease your food costs?

A. Because your patients need to eat more if they are up and about.

Q. Couldn't they raise their own food?

A. They can help.

Q. It is a farming and dairy community?

A. They can help.

(Testimony of John LeRoy Haskins.)

Q. In fact, they could produce enough produce to sell if they were all healthy and able to work, couldn't they?

A. If you are talking about the patient being able to work, he may be physically able to, but, because an individual is [67] physically able to work in that hospital doesn't mean that he will work. Sometimes they object to working because of their delusions, and he may have objections to working.

Q. Did George Gartner have any objections to work? A. At times.

Q. For how extended a period?

A. There was a period when he first went in, I remember from the notes, that he was quite restive. Of course, during the past five years, he hasn't done anything.

Q. But during fifteen years of the twenty years, at least, he was——

A. (Interposing): No, not fifteen years. There was considerable time during his early residence when he was rather restive and didn't do anything.

Q. But if all of the patients had been exactly like George Gartner, don't you think the costs would have been a great deal less? I want your fair opinion.

A. Are you figuring the mental condition or physical?

Q. Both the mental condition and the physical condition. If they were just exactly like George Gartner, if you had three hundred patients like George Gartner.

(Testimony of John LeRoy Haskins.)

A. For the past five years, it would be twice what it is now.

Q. Twice as much as it is now?

A. It might be. It would be higher, because he does nothing.

Q. What? [68]

A. He is doing nothing now.

Q. You don't mean that, Doctor, supposing that, presuming that in the period of 1927 to 1942 your hospital had patients identically like George Gartner was during the period of 1927 to 1942, requiring the attention George Gartner required during those years, capable of performing the services for the same period that George Gartner performed during those years, that the costs would be as high?

A. You would need exactly the same number of physicians that you have now.

Q. Well, he didn't require any physical care, you said, until he had this cardiac failure?

A. Wait a minute. We were talking about psychiatric care.

Q. You are the psychiatrist, are you not?

A. This other hospital man is interested in the psychiatric examinations, and he acts frequently as a psychiatrist as well.

Q. I misunderstood. I thought you took care of the psychiatry.

A. I do the major part of it, yes, but you would need the same number of doctors you have there now, because you have to keep the same check on the patients that are up. You want to know what he is doing, what he is thinking about. You would

(Testimony of John LeRoy Haskins.)

have the same number of occupational therapists——

Q. (Interposing): George Gartner never needed an occupational therapist, did he?

A. We had never been able to get him to go to the occupational [69] therapy shop. I don't think the cost would have been a great deal less than it has been.

Q. But it would be less?

A. It might be.

Mr. Clasby: I have no other questions.

Mr. Arend: If the Court please, at this time we ask permission to read the stipulation to the jury.

The Court: Very well.

Mr. Clasby: We object to the stipulation being admitted in evidence upon the grounds and for the reason that the contract price as therein stipulated is not proper evidence to be submitted in a proceeding of this kind and has no tendency to prove any of the issues.

The Court: Objection overruled. You may mark that as an exhibit, Mr. Clerk.

(Whereupon "Agreed Statement of Facts and Stipulation" was marked as Plaintiff's Exhibit A by the clerk of the court. Said Stipulation was read by Mr. Berrett and is in words and figures as follows:)

“In the District Court for the Territory of Alaska
Fourth Judicial Division

“No. 5368

“UNITED STATES OF AMERICA,

Plaintiff.

vs.

“GEORGE GARTNER, an Insane Person, and
MIKE ERCEG, Guardian of the Estate of
George Gartner, an Insane Person,

Defendants.

“AGREED STATEMENT OF FACTS AND
STIPULATION

“The above named plaintiff and the defendants, acting by and through their respective undersigned attorneys, hereby stipulate and agree that, if witnesses were called and examined on the question of expenditures made by the plaintiff for the care and maintenance of the said defendant, George Gartner, an insane person, at Morningside Hospital, at Portland, Oregon, the following facts would be established by the testimony, to-wit:

I.

“That under the provisions of the Act of Congress of February 6, 1909, (35 Stat. 601, 48 U.S.C. 46), and prior to the admission of the said George Gartner to the said hospital on August 10, 1927, there was in effect between the Department of Interior of the United States of America and the

Sanitarium Company, an Oregon corporation, which Company during all of the times hereinafter mentioned operated said Morningside Hospital, a contract dated December 14, 1923, and bearing the number No. I Sec-1/2, providing for the care, custody, medical treatment and maintenance, during a period of five years from and including January 16, 1925, at a rate of \$52 per patient, per month, of such residents of Alaska as legally were adjudged insane and committed to the said hospital, and that the Department of the Interior and the said company entered into other similar contracts, bearing the dates and numbers and for [71] the periods and at the rates per patient, per month, as follows: April 3, 1929 (No. I Sec-35), five years from and including January 16, 1930, at \$47; May 22, 1934 (No. I Sec. 143), one year from and including January 16, 1935, at \$47; June 8, 1935 (No. I Sec-168), one year from and including January 16, 1936, at \$50; July 17, 1936 (No. I Sec-188), one year from and including January 16, 1937, at \$50; June 5, 1937 (No. I Sec-207) for the period beginning January 16, 1938, and ending June 30, 1943—unless sooner terminated, as therein provided—at \$54.

II.

That between the 10th day of August, 1927, and the 13th day of October, 1942, both dates inclusive, the said George Gartner, an insane person, was kept and maintained continuously in said hospital under said contracts; and that during said period last mentioned the plaintiff expended from the public funds and paid to said Morningside Hospital, under the

said contracts, the total sum of Nine Thousand One Hundred Eighty and 11/100 Dollars (\$9,180.11) for the care and maintenance of the said George Gartner at said hospital, said payments being itemized as follows:

8/10/27 to 1/15/30 @ \$52.00 per month....	\$1,518.90
1/16/30 to 1/15/35 @ \$47.00 per month....	2,820.76
1/16/35 to 1/15/36 @ \$47.00 per month....	563.24
1/16/36 to 1/15/37 @ \$50.00 per month....	600.81
1/16/38 to 10/13/42 @ \$54.00 per month..	3,075.27

“III.

“It is especially agreed by the parties to this action that nothing in this stipulation contained shall be taken as establishing the reasonable cost of the care and maintenance of the said George Gartner at said hospital during the period stated or as establishing the fact that the defendant, George Gartner, is indebted to the plaintiff in the said sum of \$9,180.11, or any other sum; and both parties reserve the right to produce at the trial of this cause whatever testimony they, or either of them, may see fit concerning such reasonable cost and/or indebtedness as aforesaid.

“Dated at Fairbanks, Alaska, this 10th day of September, 1946.

/s/ HARRY O. AREND,

United States Attorney.

JOHN MCGINN,

COLLINS & CLASBY,

By CHAS. J. CLASBY,

All Attorneys for the

Defendants.”

Mr. Arend: The United States rests, your Honor.

(A short recess was declared, after which the court was duly reconvened.)

The Court: Will counsel stipulate that all members of the jury are present?

Mr. Clasby: We so stipulate.

Mr. Arend: We so stipulate. [73]

Mr. Clasby: At this time, if the Court please, we would like to move the entry of a non-suit upon the grounds and for the reason that the government has failed to establish the right to recover under the common law in that their evidence does not show that there have been any profits from the property belonging to the estate of George Gartner, an insane person, against which the charges of his care and maintenance can be assessed.

The Court: The motion will be denied.

MIKE ERCEG

called as a witness on behalf of the defendants, having been first duly sworn by the clerk of the court, was examined and testified as follows:

Direct Examination

By Mr. Clasby:

Q. Would you state your name, please?

A. Mike Erceg.

Q. Are you a resident of Fairbanks?

A. Yes, sir.

Q. How long have you been here, Mr. Erceg?

A. About forty years.

(Testimony of Mike Erceg.)

Q. Are you now the duly appointed, qualified, and acting guardian of the estate of George Gartner, an insane person? A. Yes.

Q. How long have you held that trust?

A. How long I know George Gartner?

Q. How long have you been his guardian?

A. Since 1927.

Q. Did you know George Gartner before that?

A. Yes, sir.

Q. How long before that?

A. Three years before that.

Q. How old would you say George Gartner was when he was committed as an insane person? [75]

A. How old he is?

Q. Then. A. I think he was born in 1887.

Q. He was about forty years old in 1927?

A. Yes.

Q. Had he worked for you? A. Yes, sir.

Q. How long had he worked for you?

A. He worked for me two seasons.

Q. Doing what kind of work?

A. Firing boiler on a drill, working on a drill.

Q. What was his physical condition at the time he was working for you?

A. It was pretty good.

Q. Did you see him at the time he was committed to the Sanitarium? A. Yes, sir.

Q. What was his physical condition?

A. Physically he was pretty good.

Q. Was he a husky man?

(Testimony of Mike Erceg.)

Mr. Arend: If the Court please, now we object to any further questions regarding the physical condition of the defendant. This witness is not even qualified to testify regarding his physical condition.

The Court: Objection sustained.

Q. Mr. Erceg, have you seen George Gartner since he was committed? [76] A. Yes.

Q. When? A. 1932.

Q. Have you seen him since then?

A. Yes.

Q. When? A. 1939.

Q. Where was he when you saw him in 1932?

A. I see him in Morningside Sanitarium.

Q. Near Portland?

A. Portland, Oregon, Yes.

Q. Was he confined there as a patient then?

A. He was a patient there, yes.

Q. Did you go out there to visit him, out to the Sanitarium to visit him?

A. Did I visit him?

Q. Yes. A. Yes.

Q. Do you remember what month that was in 1932? A. Physically——

Q. (Interposing): I said, do you remember what month that was in 1932?

A. Yes, it was April.

Q. Did you see George Gartner at that time?

A. Did I see him? [77]

Q. Yes. A. Yes.

Q. Did you talk to him? A. Yes.

(Testimony of Mike Erceg.)

Q. Did you observe him working?

A. Yes.

Q. What was he doing?

A. Well, he was working on the farm probably four or five hundred feet from the main hospital, he and eleven other men.

Q. Did you happen to know any other persons that were in that group from Alaska?

A. Yes.

Q. Who did you know?

A. George Kordich from Goldstream Creek.

Q. Anyone else?

A. Yes, fellow by name of Meyer from Deadwood Creek up here.

Q. How long were you at that institution in that visit? A. How long I was there?

Q. Yes.

A. I didn't look at the time. Mr. Tom Youle, he take me there. We was there between two and three hours.

Q. Did you meet the doctor that was in charge?

A. Yes. I went first to see doctor, yes.

Q. Who was that? What was his name?

A. His name was Dr. Locke—something like that. [78]

Q. Did you ask to see George Gartner and talk with him?

A. Well, I called guard there, big, skookum man, just as big as that doctor over there, and he said—

Mr. Arend: We object to hearsay testimony, your Honor.

(Testimony of Mike Erceg.)

The Court: Objection sustained.

Q. Did the doctor permit you to talk with George Gartner?

A. Yes, I talked to George Gartner, yes.

Q. Where were you when you talked with George Gartner?

A. I saw George Gartner right in the yard, and he come inside of the house beside the doctor's office.

Q. Beside the doctor's office inside the building?

A. Yes.

Q. Did you ask him what he was doing?

A. Yes.

Mr. Arend: We object to that unless it is shown that the plaintiff or one of its agents was there during the conversation.

The Court: Objection sustained. The pleadings admit that he was an insane person all during that time and confined there. I can't see the relevancy at this time.

Mr. Clasby: Well, supposing that I make my offer of proof, and then the court can rule on it and avoid ruling on a series of questions.

The Court: All right.

(The following offer was made out of the hearing of the jury:) [79]

Mr. Clasby: We offer to prove by this witness—and for that purpose I will condense the testimony—that he visited the Sanitarium on two different occasions: once in 1932 and once in 1939; that on each of those occasions he observed George Gartner

(Testimony of Mike Erceg.)

working; that on each of those occasions he talked with George Gartner; that on each of those occasions he inquired of George Gartner what he had been doing and that on the first of those occasions he was told by George Gartner that he had been working on the farm; that on the second of those occasions, in 1939, he was told by George Gartner that he was working in the kitchen; that on each of those occasions he told Mike Erceg that he was working from four to six hours a day and that he was receiving no pay for that work. The witness will further testify that on each of those occasions, that is to say, 1932 and 1939, he observed the physical condition of George Gartner and that George Gartner was healthy and was apparently capable of performing physical labor.

The Court: That is the offer?

Mr. Clasby: That is the offer.

Mr. Arend: Well, your Honor, we object to conversations with an insane person. There is no showing either that——

The Court (Interposing): Now, what is your objection to his offer?

Mr. Arend: We object to all of the testimony that has been offered. [80]

The Court: On what ground?

Mr. Arend: On the ground that it is irrelevant, immaterial and also incompetent.

The Court: Objection sustained.

Mr. Clasby: For the purpose of the record, counsel for the defendants would like to state that

(Testimony of Mike Erceg.)

the offer of proof is made for the purpose of demonstrating that George Gartner had ability to and did perform services for the asylum that are in mitigation of the reasonable value of services rendered by the government to George Gartner, and that was the purpose of the testimony offered.

(The following proceedings were had in the presence of the jury:)

Q. Mr. Erceg, would you tell us what property George Gartner had when you assumed control of his estate?

Mr. Arend: If the Court please, we object to this testimony as irrelevant and immaterial. Whether or not he had property is not relevant and material to the issues in this case.

The Court: Objection sustained.

Q. Does George Gartner's estate now have any assets that represent income from the property that you have administered in this estate?

A. No.

Mr. Arend: We object to that question on the same [81] grounds as the preceding question.

The Court: Objection sustained.

Mr. Clasby: And in that connection, if the Court please, we would like again to make an offer of proof.

(The following offer of proof was made out of the presence of the jury:)

Mr. Clasby: We offer to prove by this witness, if he were permitted to testify, that the only assets

(Testimony of Mike Erceg.)

belonging to the estate of George Gartner, an insane person, at the time he was committed to the Sanitarium were three unpatented mining claims, situate on Goldstream, with a small cabin thereon, and that the said George Gartner had no personal property. We further offer to prove that said George Gartner was at that time heavily indebted and that this witness paid out of his own personal funds all of the indebtedness of George Gartner, so as to prevent said mining claims from being sold; that this witness, out of his own personal funds, advanced the money necessary to do the annual labor work on said mining claims and to preserve said estate, and that said properties were, during that time and for some years after his appointment as guardian, being encroached upon by the United States Smelting, Refining and Mining Company, through their dumping of debris upon said lands, and that said lands were in no condition to be mortgaged for the production of revenue or to be mined for the production of [82] profit. We further would prove by this witness, if he were permitted to answer, that an action was filed against said mining company which resulted in a judgment of this court against said mining company in the value of the mining claims, it having been determined that the cost of removing the overburden was greater than the value of the mining claims. We further offer to prove by this witness that at that time this witness had advanced over \$10,000.00 from his personal funds for the preservation of the estate. We further offer to

(Testimony of Mike Erceg.)

prove by this witness, if he were permitted to answer, that when all the expenses were paid, following the litigation, there remains in the bank a balance of approximately \$9,000.00, and that of the sum of \$9,000.00 there now remains in the hands of this guardian approximately \$7,000.00, representing the value of the land alone and not income therefrom. We further offer to prove by this witness that the mining claims are now valueless so far as the possibility of conducting mining operations thereon, and that said claims cannot be mortgaged for the production of revenue by reason of overburden existing thereon. We offer to prove by this witness that here has been no profits over and above the necessary expenses of preserving the property of this estate during the time that it has been administered by the guardian.

Mr. Arend: We object to all of the testimony as irrelevant and immaterial under the issues of this case. [83]

The Court: Objection sustained.

Mr. Clasby: I have no other questions.

Mr. Arend: No cross-examination.

(Witness excused.)

CECIL H. CLEGG,

called as a witness on behalf of the defendants, having been duly sworn by the clerk of the court, was examined and testified as follows:

(Testimony of Cecil H. Clegg.)

Direct Examination

By Mr. Clasby:

Q. Would you state your name, please?

A. Cecil H. Clegg.

Q. Are you a member of the bar in Alaska?

A. Yes, sir.

Q. How long have you been a member of the bar in Alaska? A. Since 1900.

Q. Have you practiced continuously since 1900, except for the years you were on the bench as a judge?

A. Well, yes. I was out of the practice for a while down in the Bristol Bay country in the year 1902. There was no practice down there.

Q. Have you practiced in the Second Division for Alaska? A. Yes, two years.

Q. And in the Third Division? [84]

[No answer in copy.]

Q. And in the First?

A. Yes, several years.

Q. And in the Fourth?

A. I have been in the Fourth Division practically since 1907.

Q. During what years was it that you were district judge of this court?

A. Well, that was from 1921 to 1942, I think it was.

Q. 1942? A. Yes, but that can't be right.

Q. What?

A. I say, that cannot be right. It wasn't that long. It must have been for a period of about twelve

(Testimony of Cecil H. Clegg.)

years, twelve and a half years, between 1921 and 1933.

Q. During the time that you have been admitted to the bar in Alaska, have you been familiar with the statutes and the procedure for commission of persons that are insane?

A. Yes, as much as any lawyer who is engaged in general practice.

Q. And to the like extent, have you been familiar with the practices of the government in paying for and maintaining their insane patients at Morningside Hospital?

A. Yes. I have come in contact with that sort of work considerably.

Q. And in your experience do you know personally, or have you ever heard of any law suit or claim having been made by the federal government for recompense from the estate of insane [85] persons of the cost of the care and maintenance of those persons in Morningside prior to the year 1942?

Mr. Arend: If the Court please, we object to the question as irrelevant, incompetent, immaterial, and not in issue in this case.

The Court: Objection sustained.

Mr. Clasby: I think that is all.

The Court: Any cross-examination?

Mr. Arend: No cross-examination.

Mr. Clasby: There is one other phase I would like to make by an offer of proof rather than by

direct question, because I don't want to present it before the jury.

(The following offer was made out of the presence of the jury:)

Mr. Clasby: In addition to the answer "no" to the question that has been asked, we offer to prove by this witness, if he were permitted to answer, that it was the general understanding among the bench and the bar of Alaska, from the year 1900 to 1942, insofar as this witness is acquainted with it, that the payments made by the government for the care and maintenance of insane persons were made as a gratuity and without any policy or expectation of recovering or recouping those expenses.

Mr. Arend: We object to the question as incompetent, irrelevant, and immaterial and not binding upon the government. [86]

The Court: Objection sustained.

Mr. Clasby: The defense rests.

Mr. Arend: The government rests.

Mr. Clasby: Might it be possible for us to see the instructions before we start argument?

Mr. Arend: I would like that privilege, your Honor, if it doesn't take too long.

The Court: Well, you are not making a motion for a directed verdict?

Mr. Arend: Well, your Honor, we move the Court for a directed verdict in this case, directing the jury to bring in a verdict in line with the values established by the government's witness, Dr. Haskins, on the grounds that it was the only evidence of value introduced in this case, evidence of the

reasonable value of the care and maintenance of George Gartner at Morningside Hospital from August 10, 1927, to October 13, 1942, both dates inclusive.

Mr. Clasby: May it please the Court, when someone is looking at you with a shotgun, there isn't a great deal you can say. It appears to us, however, that there is what might, in some legal circles, be called a scintilla of evidence that could be seized upon as a reason for carrying the case to the jury, and that is the doctor's statement that so far as George Gartner's care was concerned, if all patients were like him, it might have been possible that the cost would have been a [87] little less. Our bewilderment at being sued some twenty years later can be understood and our inability to disprove the government's figures, going so far back in history, can likewise be readily understood. We have offered what we think is a question for the jury, and that is that this man was not a patient that required a great deal of care and attention and that he could perform services, and the evidence shows that the price testified to is a per capita average cost, and we believe this jury is entitled to, under the evidence and the law, have submitted to them the question of whether or not that price is what the value of these particular services rendered to George Gartner was; and on that theory we resist counsel's motion for a directed verdict.

The Court: The motion is granted. Ladies and gentlemen of the jury, you are instructed that the evidence in this case, under the law governing it,

shows that the plaintiff is entitled to a judgment as prayed for in the complaint. You are, therefore, instructed to bring in a verdict in favor of the plaintiff in the sum of \$9180.00. I will appoint Mr. Green foreman of the jury to sign the verdict.

(Thereupon the jury rendered its verdict according to the instructions of the Court.)

The Court: The verdict may be read.

(The verdict was read by the clerk of the court.)

The Court: The verdict may be filed. The jury is excused. [88]

Mr. Clasby: Could the record show an exception on behalf of the defendants to the granting of said motion?

The Court: Very well. [89]

(The following instructions were requested by the defendants:)

“In the District Court for the Territory of Alaska
Fourth Division

“UNITED STATES OF AMERICA, Plaintiff,

vs.

“GEORGE GARTNER, an Insane Person, and
MIKE ERCEG, Guardian of the Estate of
George Gartner, an Insane Person,
Defendants.

“No. 5368. Plaintiff's Requested Instruction No. 1.

“You are instructed that according to the Com-

mon Law, the sovereign has the duty of caring for and preserving the estate of insane persons and the privilege of using the profits therefrom for the care and maintenance of the insane person and his family. You are further instructed that the sovereign has provided for the preservation and care of the estate of an insane person by the appointment in its Courts of a guardian for that purpose.

You are instructed therefor that before you may return a verdict for the plaintiff in this cause, you must first find:

- a. That George Gartner had property;
- b. That the property or estate of George Gartner has produced a revenue over and above the cost of caring and [90] preserving the property; and
- c. That there exists profits from the property in the Estate of George Gartner, which can be devoted to his care and maintenance.

“You are further instructed that upon finding conditions existing as specified in a, b and c above, that you may then, by your verdict, charge the Estate of George Gartner, an insane person, with the reasonable value of his care and maintenance as is elsewhere in these instructions defined, in no greater total amount, however, than the total profits of said Estate, derived from the property of the Estate of George Gartner. [91]

“In the District Court for the Territory of Alaska
Fourth Division

“UNITED STATES OF AMERICA, Plaintiff,

vs.

“GEORGE GARTNER, an Insane Person, and
MIKE ERCEG, Guardian of the Estate of
George Gartner, an Insane Person,
Defendants.

“No. 5368. Plaintiff’s Requested Instruction No. 2.

“You are instructed that according to the Common Law in effect in the Territory of Alaska during the period involved in the Complaint in this action, estates of insane persons were liable for the reasonable value of services for the care and maintenance of the insane ward furnished to him.

“You are instructed that in determining the reasonable value of the services for care and maintenance furnished to the insane person, George Gartner, you shall take into account the following:

“a. The mental and physical condition of George Gartner and the amount of care and maintenance necessary for his condition;

“b. The type, character, and amount of services rendered to George Gartner by the Morningside Hospital for the maintenance of George Gartner; the type, character and amount of medical and other care supplied by the Morningside Hospital for [92] the care of George Gartner; and

“c. The type, character and amount of work and labor performed by said George Gartner for said Morningside Hospital and the extent to which said services offset the cost to the Morningside Hospital of maintaining and caring for George Gartner in whole or in part; and

“d. An allowance to said Morningside Hospital on account of the care and maintenance rendered to George Gartner of a reasonable profit only for the performance of such service.

“You shall likewise take into consideration the fact that the reasonable value of the service performed for George Gartner necessarily varied from year to year in accordance with the cost of securing the necessary supplies and services for performing the function of caring and maintaining George Gartner in said Morningside Hospital.” [93]

“In the District Court for the Territory of Alaska
Fourth Division

“UNITED STATES OF AMERICA, Plaintiff,

vs.

“GEORGE GARTNER, an Insane Person, and
MIKE ERCEG, Guardian of the Estate of
George Gartner, an Insane Person,

Defendants.

“No. 5368. Plaintiff’s Requested Instruction No. 3.

“The Court in this Cause has admitted into evi-

dence the per capita cost to the Plaintiff each year, during each of the years involved in Plaintiff's Complaint, for the care and maintenance of a patient at the Morningside Hospital.

"You are instructed that said amount is not to be taken by yourselves as conclusive, and is not binding upon the Defendant, George Gartner, for the reason that the same does not show the reasonable value of the services rendered to George Gartner but merely the cost to the Government based on an average, for the maintenance of a patient at said hospital. You may, however, consider said per capita price in connection with all of the other evidence in this case in determining the reasonable value of the services for care and maintenance rendered to the insane person, George Gartner.

"Service acknowledged by receipt of copy of 3 proposed instructions of defendant.

"HARRY O. AREND,

"United States Attorney."

I, Muriel Anderson Lomen, of Fairbanks, Alaska, hereby certify:

That I am the official court reporter in the District Court for the Territory of Alaska, Fourth Division; that I attended the trial of the cause entitled, "United States of America, Plaintiff, vs. George Gartner, an Insane Person, and Mike Erceg, Guardian of the Estate of George Gartner, an insane person, Defendants, No. 5368," at Fairbanks, Alaska, on November 20, 1946, and took down in

shorthand the testimony given and proceedings had thereat; that I thereafter transcribed said shorthand, and the foregoing pages, numbered 1 to 67, inclusive, comprise a full, true, and correct statement and transcript of such testimony and proceedings.

Dated at Fairbanks, Alaska, this 31st day of December, 1946.

MURIEL ANDERSON LOMEN,
Court Reporter.

[Endorsed]: Filed Dec. 31, 1946. [95]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To The United States of America, Plaintiff above named, and to Harry O. Arend, United States Attorney, its Attorney:

Notice is hereby given that the above named Defendants, and each of them, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, from the final judgment, made and entered in this action in the above entitled Court, on the 6th day of December, 1946, in favor of the Plaintiff, and against the said Defendants, George Gartner, an insane person, and Mike Erceg, Guardian of the Estate of George Gartner, an insane person, wherein it was ordered and adjudged that the Plaintiff have and recover from the Defendant George Gartner and from the Defendant Mike Erceg, as Guardian of

the Estate of George Gartner, an insane person, the sum of nine thousand one hundred eighty dollars and eleven cents (\$9,180.11), with interest thereon at the rate of six per centum (6%) per annum from the date of said judgment until paid, together with the costs and disbursements of said action. Defendants also appeal from the order of said Court denying their Motion for New Trial of said action.

JOHN L. MCGINN,
COLLINS & CLASBY,
By /s/ CHAS. J. CLASBY,
Attorneys for Defendants.

Service of the foregoing Notice of Appeal by receipt of a copy thereof, is hereby acknowledged this 20th day of February, 1947.

/s/ HARRY O. AREND,
United States Attorney.

[Endorsed]: Filed Feb. 20, 1947.

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

The above-named defendants, George Gartner, an insane person, and Mike Erceg, guardian of the estate of George Gartner, an insane person, and each of them, considering themselves agreed by the judgment of this Court made and entered in the above-entitled action on the 6th day of December, 1946, in favor of the above-named plaintiff, and against the said defendants, wherein it was ordered

and adjudged that the plaintiff have and recover from the defendant George Gartner and from the defendant, Mike Erceg, as guardian of the estate of George Gartner, an insane person, the sum of Nine Thousand One Hundred Eighty Dollars and Eleven Cents (\$9,180.11), with interest at the rate of six per centum (6%) per annum from the date of said judgment until paid, together with plaintiff's costs and disbursements of said action, do hereby appeal from said judgment and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified and set forth in the Assignment of Errors, which is filed herewith, and the said defendants pray that this Appeal be allowed and that a transcript of the record, proceedings and papers upon which the said Judgment was made, duly authenticated by the Clerk of this Court may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California. [97]

Dated at Fairbanks, Alaska, this 20th day of February, 1947.

JOHN L. MCGINN,
COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Defendants.

Service of the foregoing Petition for Allowance of Appeal, by receipt of a copy thereof, is hereby acknowledged this 20th day of February, 1947.

/s/ HARRY O. AREND,

United States Attorney.

[Endorsed]: Filed Feb. 20, 1947. [98]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the above-named defendants and allege that the Judgment of the above-entitled Court, entered in the above-entitled cause on the 6th day of December, 1946, is erroneous, unjust to them, and file with their Petition for an Allowance of Appeal the following assignments of error upon which they will rely:

I.

The Court erred in overruling the Demurrer of the Defendants to the complaint of Plaintiff upon the grounds that the Court had no jurisdiction of the subject of the action, and that the Complaint does not state facts sufficient to constitute a cause of action.

II.

The Court erred in sustaining Plaintiff's Demurrer to Defendants' First and Second Affirmative Defenses stated in their Amended Answer upon the grounds that said defenses failed to state sufficient facts to constitute a defense.

III.

The Court erred in permitting John LeRoy Haskins, a witness called on behalf of Plaintiff, to testify over the objections of Defendants, as follows:

“Q. How long have you known of Morning-side Hospital by actually being there or by repute? [99]

A. I know about it a year and a half or two years before I went there.

Q. How has it ranked with other institutions of a similar type throughout the country?

Mr. Clasby: To which we object, if the Court please. It has no bearing on the issues in this case.

The Court: Objection overruled.

Q. Just answer the questions.

A. Well, we believe that our discharge ratio of admissions—that is, the number of patients discharged as compared with the number of patients admitted ranks as well up with any other hospitals, and our death rates are quite low.”

IV.

The Court erred in permitting John LeRoy Haskins, a witness called on behalf of the Plaintiff, to testify over the objections of Defendants, as follows:

“Q. How does the care and maintenance furnished at Morningside compare with other mental hospitals?

Mr. Clasby: We address the same objection to that question.

The Court: Objection overruled.

Q. You may answer the question.

A. We believe that our—we know that our food—the patients—the food the patients have there is better than the average mental hospital. We very often have attendants or nurses tell us that the food that the patient gets there is better than the staff food

in most hospitals. We believe that the care is—our number of attendants to the patients is much higher than the average for the United States; that is, we have more attendants. You rate your number of attendants, having so many patients to each attendant. For instance, you would say we had three hundred patients and you had fifty attendants, you would have one attendant for six patients. We usually run one to five. We find many in the States run one to sixteen, one to eighteen, one to twenty. The proportion of attendants is higher, which [100] we believe gives better care.”

V.

The Court erred in permitting John LeRoy Haskins, a witness called on behalf of Plaintiff, to testify over the objection of Defendants, as follows:

“Q. Are you acquainted with George Gartner? A. Yes.

Q. How long have you known him?

A. I have known George since July, 1936.

Q. Now, Dr. Haskins, I would like to have you state to the jury what, in your opinion, was the reasonable value of the care and maintenance provided Mr. George Gartner at Morningside Hospital, on a monthly basis, per month during 1927?

Mr. Clasby: To which we object, if the Court please, for several reasons. The first, this witness was not present at the hospital in 1927 and has no personal knowledge of the

services that were then performed for George Gartner. This witness was not then a member of the staff of the Sanitarium Company and has no knowledge of what it cost the Sanitarium Company to supply those services or what the reasonable value of those services were. This witness has further testified that at that time he was in New York—or, no—he was in the general practice of medicine. He was not even connected with psychiatry or had any knowledge of hospitals for insane patients.

The Court: Objection overruled.

A. About \$52.00 a month.”

VI.

The Court erred in permitting John LeRoy Haskins, a witness called on behalf of Plaintiff, to testify over the objection of Defendants, as follows:

“Q. Will you give us your answer to the same question for the year 1928?

Mr. Clasby: Just a moment. To which we interpose the same objection, if the Court please. The witness’ testimony shows in 1928 he was in private [101] practice; he had no familiarity with this institution or this patient or costs at psychiatric institutions. It hasn’t been shown that he has any records or information available to him from which to form an opinion as to the cost in 1928, the same as our objection to the year 1927. There is other and better evidence that can be produced to

establish that cost, and that is the record of the sanitarium itself.

The Court: Objection overruled.

A. \$52.00 a month."

VII.

The Court erred in permitting John LeRoy Haskins, a witness called on behalf of Plaintiff, to testify over the objections of Defendants as follows:

"Q. And will you answer the question with reference to the year 1929?

A. \$52.00 a month.

Mr. Clasby: We, if the Court please, would like to have the record show an objection to all questions of this kind up to the year 1936.

The Court: Very well. The same ruling to the objections.

Q. For 1930?

A. 1930. At that time food prices were somewhat lower.

Mr. Clasby: We object to comments by the witness.

Mr. Arend: Yes. You can just state——

A. (Interposing) \$47.00.

Q. 1931? A. \$47.00.

Q. 1932? A. \$47.00.

Q. 1933? A. \$47.00.

Q. 1934? A. \$47.00.

Q. 1935? A. \$47.00.

Q. 1936? A. \$50.00."

VIII.

The Court erred in refusing to strike the testimony of Plaintiff's witness John LeRoy Haskins as to the reasonable value of Plaintiff's services [102] to the Defendant George Gartner for the reason that said testimony was based entirely upon the contract price between the Plaintiff and the Sanitarium Company, the proceeding in relation thereto being as follows:

“Q. On what do you base that?

A. Well, I base it on reports which we have from the United States Public Health Service and the physician who was on duty at the institution at that time.

Q. What did he base it on?

A. He based it on what he believed to be adequate care of the patient. They were getting adequate care, and an investigation had shown that that was about equivalent with the care in other hospitals of the same type.

Q. You, at that time, had no knowledge of the care that was given to George Gartner?

A. I am going on his notes, his clinic records, and his observations which are in the hospital now, and his reports to the department covering those periods.

Q. Well, aren't you largely going on the contract price?

A. If the contract price was a fair—If the contract price was a fair price, and it was, that was the adequate care.

Q. If I recall your testimony properly,

Doctor, your testimony coincides exactly with the contract price? A. Well——

Q. Isn't that correct?

A. Yes, we believe that——

Q. (Interposing): Now, wait a minute. And that your testimony as to when the reasonable value of the services rendered George Gartner varied, why the contract varied too? [103]

A. Yes.

Q. Now I ask you, isn't your testimony based entirely upon the contract price?

A. What else would it be based on?

Mr. Clasby: Well, on that basis, if the Court please, we move that this testimony be stricken for the reason that he has admitted it is based on the contract price."

IX.

The Court erred in admitting, over objection by the Defendants, the contract price for per capita care of patients at Morningside Hospital during the years 1927 to 1942; agreed upon between the Plaintiff and the Santarium Company, the proceedings relating thereto being as follows:

"Mr. Arend: If the Court please, at this time we ask permission to read the stipulation to the jury.

The Court: Very well.

Mr. Clasby: We object to the stipulation being admitted in evidence upon the grounds and for the reason that the contract price as therein stipulated is not proper evidence to be

submitted in a proceeding of this kind and has no tendency to prove any of the issues.

The Court: Objection overruled. You may mark that as an exhibit, Mr. Clerk.

(Whereupon "Agreed Statement of Facts and Stipulation" was marked as Plaintiff's Exhibit A by the Clerk of the Court. Said stipulation was read by Mr. Berrett and is in words and figures as follows:) [104]

"In the District Court for the Territory of
Alaska, Fourth Judicial Division

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE GARTNER, an Insane Person, and
MIKE ERCEG, Guardian of the Estate of
George Gartner, an Insane Person,
Defendants.

No. 5368

AGREED STATEMENT OF FACTS AND STIPULATION

The above-named plaintiff and the defendants, acting by and through their respective undersigned attorneys, hereby stipulate and agree that, if witnesses were called and examined on the question of expenditures made by the plaintiff for the care and maintenance of the said defendant, George Gartner, an insane

person, at Morningside Hospital, at Portland, Oregon, the following facts would be established by the testimony, to-wit:

I.

That under the provisions of the Act of Congress of February 6, 1909, 35 Stat. 601, 48 U.S.C. 46, and prior to the admission of the said George Gartner to the said hospital on August 10, 1927, there was in effect between the Department of Interior of the United States of America and the Sanitarium Company, an Oregon corporation, which company during all of the times hereinafter mentioned operated said Morningside Hospital, a contract dated December 14, 1923, and bearing the number No. 1 Sec-1½, providing for the care, custody, medical treatment and maintenance, during a period of five years from and including January 16, 1925, at a rate of \$52 per patient, per month, of such residents of Alaska as legally were adjudged insane and committed to the said hospital, and that the Department of the Interior and the said company entered into other similar contracts, bearing the dates and numbers and for the periods and at the rates per patient, per month, as follows: April 3, 1929 (No. 1 Sec-35), five years from and including January 16, 1930, at \$47; May 22, 1934, [105] (No. I Sec. 143), one year from and including January 16, 1935, at \$47; June 8, 1935, (No. I Sec-168), one year from and including January

16, 1936, at \$50; July 17, 1936, (No. I Sec-188), one year from and including January 16, 1937, at \$50; June 5, 1937, (No. I Sec-207) for the period beginning January 16, 1938, and ending June 30, 1943—unless sooner terminated, as therein provided—at \$54.

II.

That between the 10th day of August, 1927, and the 13th day of October, 1942, both dates inclusive, the said George Gartner, an insane person, was kept and maintained continuously in said hospital under said contracts; and that during said period last mentioned the plaintiff expended from the public funds and paid to said Morningside Hospital, under the said contracts, the total sum of Nine Thousand One Hundred Eighty and 11/100 Dollars (\$9,180.11) for the care and maintenance of the said George Gartner at said hospital, and payments being itemized as follows:

8/10/27 to 1/15/30 @ \$52.00 per month	\$1,518.90
1/16/30 to 1/15/35 @ \$47.00 per month	2,820.76
1/16/35 to 1/15/36 @ \$47.00 per month	563.24
1/16/36 to 1/15/37 @ \$50.00 per month	600.81
1/16/38 to 10/13/42 @ \$54.00 per month	3,075.27

III.

It is specially agreed by the parties to this action that nothing in this stipulation contained shall be taken as establishing the reasonable cost of the care and maintenance of the said George Gartner at said hospital during the

period stated or as establishing the fact that the defendant, George Gartner, is indebted to the plaintiff in the said sum of \$9,180.11, or any other sum; and both parties reserve the right to produce at the trial of this cause whatever testimony they, or either of them, may see fit concerning such reasonable cost and/or indebtedness as aforesaid.

Dated at Fairbanks, Alaska, this 10th day of September, 1946.

/s/ HARRY O. AREND,

United States Attorney.

JOHN MCGINN,

COLLINS & CLASBY,

By CHAS. J. CLASBY,

All Attorneys for the
Defendants."

X.

The Court erred in refusing to grant defendants motion for the entry of a non-suit, the proceeding relating thereto being as follows:

"Mr. Clasby: At this time, if the Court please, we would like to move the entry of a non-suit upon the grounds and for the reason that the government has failed to establish the right to recover under the common law in that their evidence does not show that there have been any profits from the property belonging to the estate of George Gartner, an insane person, against which the charges of his care and maintenance can be assessed.

The Court: The motion will be denied."

XI.

The Court erred in refusing to permit the Defendant, Mike Erceg, to testify as to the capacity of George Gartner to perform services for Plaintiff and his performance of services for Plaintiff in mitigation of the claim of Plaintiff, the proceedings relating thereto being as follows:

"Mr. Clasby: We offer to prove by this witness—and for that purpose I will condense the testimony—that he visited the sanitarium on two different occasions, once in 1932 and once in 1939; that on each of those occasions he observed George Gartner working; that on each of those occasions he talked with George Gartner; that on each of those occasions he inquired of George Gartner what he had been doing and that on the first of those occasions he was told by George Gartner that he had been working on the farm; that on the second of those occasions, in 1939, he was told by George Gartner that he was working in the kitchen; that on each of those occasions he told Mike Erceg that he was working from four to six hours a day and that he was receiving no pay for that work. The witness will further testify that on each of those [107] occasions, that is to say, 1932 and 1939, he observed the physical condition of George Gartner and that George Gartner was healthy and was apparently capable of performing physical labor.

The Court: That is the offer?

Mr. Clasby: That is the offer.

Mr. Arend: Well, your Honor, we object to conversations with an insane person. There is no showing either that——

The Court (Interposing): Now, what is your objection to his offer?

Mr. Arend: We object to all of the testimony that has been offered.

The Court: On what grounds?

Mr. Arend: On the ground that it is irrelevant, immaterial and also incompetent.

The Court: Objection sustained.

Mr. Clasby: For the purpose of the record, counsel for the Defendants would like to state that the offer of proof is made for the purpose of demonstrating that George Gartner had ability to and did perform services for the asylum that are in mitigation of the reasonable value of services rendered by the government to George Gartner, and that was the purpose of the testimony offered.”

XII.

The Court erred in refusing to permit the Defendant, Mike Erceg, as guardian of the Estate of George Gartner, an insane person, to testify as to the property of said George Gartner and the lack of profits therefrom, the proceedings relating thereto being as follows:

“Q. Mr. Erceg, would you tell us what property George Gartner had when you assumed control of his estate?

Mr. Arend: If the Court please, we object to this testimony as irrelevant and immaterial. Whether or not he had property is not relevant and material to the issues in this case.

The Court: Objection sustained.

Q. Does George Gartner's estate now have any assets that represents income from the property that you have administered in this estate? [108] A. No.

Mr. Arend: We object to that question on the same grounds as the preceding question.

The Court: Objection sustained.

Mr. Clasby: And in that connection, if the Court please, we would like again to make an offer of proof.

(The following offer of proof was made out of the presence of the jury:)

Mr. Clasby: We offer to prove by this witness, if he were permitted to testify, that the only assets belonging to the estate of George Gartner, an insane person, at the time he was committed to the Sanitarium were three unpatented mining claims, situate on Coldstream, with a small cabin thereon, and that the said George Gartner had no personal property. We further offer to prove that said George Gartner was at that time heavily indebted and that this witness paid out of his own personal funds all of the indebtedness of George Gartner, so as to prevent said mining claims from being sold; that this witness, out of his personal funds, advanced the money necessary to do the annual

labor work on said mining claims and to preserve said estate, and that said properties were, during that time and for some years after his appointment as guardian, being encroached upon by the United States Smelting and Refining and Mining Company, through their dumping of debris upon said lands, and that said lands were in no condition to be mortgaged (? leased) for the production of revenue or to be mined for the production of profit. We further would prove by this witness, if he were permitted to answer, that an action was filed against said mining company which resulted in a judgment of this court against said mining company in the value of the mining claims, it having been determined that the cost of removing the overburden was greater than the value of the mining claims, it having been determined that the cost of removing the overburden was greater than the value of the mining claims. We further offer to prove by this witness that at that time this witness had advanced over \$10,000.00 from his personal funds for the preservation of the estate. We further offer to prove by this witness, if he were permitted to answer, that when all the expenses were paid, following the litigation, there remains in the bank a balance [109] of approximately \$9,000.00, and that of the sum of \$9,000.00 there now remains in the hands of this guardian approximately \$7,000.00, representing the value of the land alone and not income therefrom. We fur-

ther offer to prove by this witness that the mining claims are now valueless so far as the possibility of conducting mining operations thereon, and that said claims cannot be mortgaged (? leased) for the production of revenue by reason of overburden existing thereon. We offer to prove by this witness that there has been no profits over and above the necessary expenses of preserving the property of this estate during the time that it has been administered by the guardian.

Mr. Arend: We object to all of the testimony as irrelevant and immaterial under the issues of this case.

The Court: Objection sustained.

Mr. Clasby: I have no other questions.

Mr. Arend: No cross examination.

(Witness excused.)”

XIII.

The Court erred in refusing to permit testimony on the part of Defendants by the witness Clegg to establish that Plaintiff had never before in the history of Alaska claimed recompense from the estates of insane persons for care prior to 1942, the proceedings relating thereto being as follows:

“Q. And in your experience do you know personally, or have you ever heard of any law suit or claim having been made by the federal government for recompense from the estate of insane persons of the cost of the care and main-

tenance of those persons in Morningside prior to the year 1942?

Mr. Arend: If the Court please, we object to the question as irrelevant, incompetent, immaterial and not in issue in this case.

The Court: Objection sustained."

XIV.

The Court erred in refusing the offer of Defendants to establish by testimony that prior to 1942 Plaintiff cared for the insane as a gratuity given without intent of recoupment, the proceedings relating thereto being as follows: [110]

"Mr. Clasby: There is one other phase I would like to make by an offer of proof rather than by direct question, because I don't want to present it before the jury.

(The following offer was made out of the presence of the jury:)

Mr. Clasby: In addition to the answer "no" to the question that has been asked, we offer to prove by this witness, if he were permitted to answer, that it was the general understanding among the bench and the bar of Alaska, from the year 1900 to 1942, insofar as this witness is acquainted with it, that the payments made by the government for the care and maintenance of insane persons were made as a gratuity and without any policy or expectation of recovering or recouping those expenses.

Mr. Arend: We object to the question as in-

competent, irrelevant, and immaterial and not binding upon the government.

The Court: Objection sustained.”

XV.

The Court erred in directing a verdict for the Plaintiff, and in receiving and filing such verdict as being contrary to the law and the evidence, the proceedings relating thereto being as follows:

“The Court: Well, you are not making a motion for a directed verdict?

Mr. Arend: Well, your Honor, we move the Court for a directed verdict in this case, directing the jury to bring in a verdict in line with the values established by the government’s witness, Dr. Haskins, on the grounds that it was the only evidence of value introduced in this case, evidence of the reasonable value of the care and maintenance of George Gartner at Morningside Hospital from August 10, 1927, to October 13, 1942, both dates inclusive.

Mr. Clasby: May it please the Court, when someone is looking at you with a shotgun, there isn’t a great deal you can say. It appears to us, however, that there is what might, in some legal circles, be called a scintilla of evidence that could be seized upon as a reason for carrying the case to the jury, and that is the doctor’s statement that so far as George Gartner’s care was concerned, if all patients were like him, it might have been possible that [111] the cost would have been a little less. Our bewilder-

ment at being sued some twenty years later can be understood and our inability to disprove the government's figures, going so far back in history, can likewise be readily understood. We have offered what we think is a question for the jury, and that is that this man was not a patient that required a great deal of care and attention and that he could perform services, and the evidence shows that the price testified to is a per capita average cost, and we believe this jury is entitled to, under the evidence and the law, have submitted to them the question of whether or not that price is what the value of these particular services rendered to George Gartner was; and on that theory we resist counsel's motion for a directed verdict.

The Court: The motion is granted. Ladies and gentlemen of the jury, you are instructed that the evidence in this case, under the law governing it, shows that the Plaintiff is entitled to a judgment as prayed for in the complaint. You are therefore, instructed to bring in a verdict in favor of the Plaintiff in the sum of \$9,180.00. I will appoint Mr. Green foreman of the jury to sign the verdict.

(Thereupon the jury rendered its verdict according to the instructions of the court.)

The Court: The verdict may be read.

(The verdict was read by the clerk of the court.)

The Court: The verdict may be filed. The jury is excused.

Mr. Clasby: Could the record show an exception on behalf of the Defendants to the granting of said motion?

The Court: Very well."

XVI.

The Court erred in making and entering Judgment for the Plaintiff and against Defendants in the sum of \$9,180.11 with interest thereon at the rate of 6% per annum, the same being contrary to the law and the evidence in the respects in these Assignments of Error detailed.

Wherefore, Defendants pray that the said Judgment be reversed and [112] the cause remanded for a new trial, in accordance with the law.

JOHN L. McGINN,
COLLINS & CLASBY,
By /s/ CHAS. J. CLASBY,
Attorneys for Defendants.

Service of the foregoing Assignments of Error, by receipt of a copy thereof, is hereby acknowledged at Fairbanks, Alaska, this 20th day of February, 1947.

/s/ HARRY O. AREND,
United States Attorney.

[Endorsed]: Filed Feb. 20, 1947. [113]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING
AMOUNT OF COST BOND

Now, on this 20th day of February, 1947, the same being one of the days of the General March 1946 Term of this Court, this cause came on regularly to be heard upon the Petition of the Defendants above named and each of them, for the allowance of an appeal in behalf of said Defendants from the final Judgment entered in this cause on the 6th day of December, 1946, and for the fixing of the amount of the Cost Bond on said appeal and the Court being duly advised in the premises does hereby find that the amount involved in said action is in excess of One Thousand Dollars (\$1,000.00), and that the Cost Bond herein should be fixed at the sum of Two Hundred Fifty Dollars (\$250.00).

Now Therefore, It Is Ordered That the Appeal of said Defendants from the final judgment entered herein on the 6th day of December, 1946, be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit, and that a certified copy of the transcript of record, proceedings, orders, judgment, testimony, and all other proceedings in said matter on which said Judgment appealed from is based, be transferred, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

It is further ordered that the amount of the Cost Bond herein be, and the same is hereby fixed at the

sum of Two Hundred Fifty Dollars [114] (\$250.00).

Dated at Fairbanks, Alaska, this 20th day of February, 1947.

/s/ HARRY E. PRATT,

District Judge.

Presented By:

/s/ CHAS. J. CLASBY,

One of the Attorneys for
Defendants.

Service hereof by receipt of a copy thereof is acknowledged this 20th day of February, 1947.

/s/ HARRY O. AREND,

United States Attorney.

[Endorsed]: Lodged and filed Feb. 20, 1947.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That, We, Mike Erceg, as Guardian of the Estate of George Gartner, an insane person, as principal and Charles Slater and L. Orsini, as sureties, all of Fairbanks, Alaska, are held and firmly bound unto the United States of America, in the sum of Two Hundred Fifty Dollars (\$250.00), lawful money of the United States of America, to be paid to the said United States of America, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of February, 1947.

The condition of the above obligation is such that:

Whereas the above bounden Defendants have filed their Petition for appeal and are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain Judgment in favor of the above named Plaintiff the United States of America, and against the Defendants above named, which Judgment was rendered and entered in the above entitled Court and cause on the 6th day of December, 1946, whereby it was adjudged that said Plaintiff have and recover from the Defendant George Gartner, and from the Defendant Mike Erceg, as Guardian of the Estate of George [116] Gartner, an insane person, the sum of Nine Thousand One Hundred Eighty Dollars and Eleven Cents (\$9,180.11), with interest thereon at the rate of six per centum (6%) per annum from the date of said Judgment until paid, together with Plaintiff's costs and disbursements; and

Whereas said Defendants desire to appeal from said Judgment and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said Judgment, and have given Plaintiff in said action, Notice of Appeal as required by law, and said Court having duly fixed the amount of the Cost Bond at Two Hundred Fifty Dollars (\$250.00);

Now Therefore, if the Defendants above named shall prosecute said appeal to effect, and answer all costs that may be adjudged against them if they

shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

/s/ MIKE ERCEG,

Guardian of the Estate of George Gartner, an insane person, Principal.

CHARLES SLATER,

L. ORSINI,

Sureties. [117]

United States of America,

Territory of Alaska—ss.

Charles Slater and L. Orsini being first duly sworn on oath, each for himself, deposes and says:

I am a resident of Fairbanks, in the Fourth Judicial Division, in the Territory of Alaska, that I am not an Attorney, Counsel at Law, Judge, Marshal, Clerk, Commissioner, or other officer of any Court; that I am worth the sum of Five Hundred Dollars (\$500.00), over and above all my just debts and obligations, in property not exempt from execution, situate in the Territory of Alaska.

CHARLES SLATER,

L. ORSINI.

Subscribed and sworn to before me this 20th day of February, 1947.

[Seal] /s/ CHAS. J. CLASBY,

Notary Public in and for the Territory of Alaska.

My commission expires: 4/20/48.

Approved:

/s/ HARRY O. AREND,

United States Attorney.

The foregoing bond is hereby approved this 20th day of Feb., 1947.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Filed Feb. 20, 1947. [118]

[Title of District Court and Cause.]

CITATION OF APPEAL

The President of the United States of America

To: The above named Plaintiff, the United States of America, and to Harry O. Arend, United States Attorney, Plaintiff's Attorney.

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, within forty (40) days from the date of this Citation, pursuant to an order allowing an appeal, made and entered in the above entitled cause on this day, in which the above named Defendant George Gartner, and the Defendant Mike Erceg, as Guardian of the Estate of George Gartner, an insane person, are Defendants and Appellants, and the United States of America is Plaintiff and Appellee, to show cause, if any there be, why the Judgment made and entered in said cause on the 6th day of December, 1946, in favor of the Plaintiff and against the Defendants and Appellants herein, should not be set aside and reversed, and why speedy justice should not be done to said Defendants and Appellants above named and each of them in that behalf.

Witness The Honorable Fred A. Vinson, Chief

Justice of the Supreme Court of the United States of America, on this 20th day of February, A. D., One Thousand Nine Hundred and Forty-Seven.

Entered in Court Journal Feb. 20, 1947, No. 34, Page 335.

/s/ HARRY E. PRATT,
District Judge. [119]

Service of the foregoing Citation by receipt of a copy thereof, is hereby acknowledged at Fairbanks, Alaska, this 20th day of February, 1947.

/s/ HARRY O. AREND,
United States Attorney, for
Plaintiff.

[Endorsed]: Lodged and filed Feb. 20, 1947.

[Title of District Court and Cause]

STIPULATION RE: PRINTING OF RECORD

It is hereby stipulated by and between the above named parties, Plaintiff and Defendants, through their respective Attorneys, that in printing the papers and records to be used on the hearing on appeal in the above entitled cause, for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit, the title of the Court and Cause in full on all papers shall be omitted, except on the first page of said record and that there shall be inserted in place of said title on all papers used as a part of said records the words "Title of Court and Cause". Also that all endorsements on said

papers used as a part of said record shall be omitted except the Clerk's file marks and the admission of service.

Dated at Fairbanks, Alaska, this 20th day of February, 1947.

JOHN L. McGINN,
COLLINS & CLASBY,

/s/ By CHAS. J. CLASBY,

Attorneys for Defendants
and Appellants.

/s/ HARRY O. AREND,

United States Attorney, for
Plaintiff and Appellee.

[Endorsed]: Filed Feb. 20, 1947. [121]

[Title of District Court and Cause]

PRAECIPE FOR TRANSCRIPT OF RECORD

To: John B. Hall, Clerk of the above entitled Court.

You will please prepare transcript of record in the above entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, upon the appeal heretofore perfected to said Court, and include therein the following papers and records, to-wit:

1. Complaint.
2. Demurrer to Complaint.

3. Order Overruling Demurrer; Journal 33, page 14, October 31, 1945.
4. Opinion on Demurrer.
5. Amended Answer.
6. Demurrer to First and Second Affirmative Defense in Amended Answer.
7. Order Sustaining Demurrer to First and Second Affirmative Defenses of Amended Answer, Journal 33, page 314, March 26, 1946.
8. Second Amended Answer.
9. Verdict.
10. Judgment.
11. Transcript of Testimony and Proceedings.
12. Notice of Appeal.
13. Petition for Appeal.
14. Assignments of Errors.
15. Order Allowing Appeal and Fixing Cost Bond.
16. Cost Bond on Appeal.
17. Citation on Appeal.
18. Stipulation re. Printing of Record.
19. Praecipe.
20. Agreed Statement of Facts and Stipulation.

This transcript is to be prepared as required by law and [122] the rules and orders of this Court and of the Circuit Court of Appeals for the Ninth Circuit, and is to be forwarded to said Court at San Francisco, California, so that it will be docketed therein on or before the 15th day of May, 1947.

Dated at Fairbanks, Alaska, this 6th day of May, 1947.

JOHN L. MCGINN,
COLLINS & CLASBY,
By /s/ CHAS. J. CLASBY,
Attorneys for Appellant.

Copy received this 6th day of May, 1947.
/s/ HARRY O. AREND,
United States Attorney.

[Endorsed]: Filed May 6, 1947. [123]

PLAINTIFF'S EXHIBIT A

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 5368

UNITED STATES OF AMERICA, Plaintiff,

vs.

GEORGE GARTNER, an Insane Person, and
MIKE ERCEG, Guardian of the Estate of
George Gartner, an Insane Person,
Defendants.

AGREED STATEMENT OF FACTS AND STIPULATION

The above named plaintiff and the defendants, acting by and through their respective undersigned attorneys, hereby stipulate and agree that, if wit-

nesses were called and examined on the question of expenditures made by the plaintiff for the care and maintenance of the said defendant, George Gartner, an insane person, at Morningside Hospital, at Portland, Oregon, the following facts would be established by the testimony, to-wit:

I.

That under the provisions of the Act of Congress of February 6, 1909, (35 Stat. 601, 48 U.S.C. 46, and prior to the admission of the said George Gartner to the said hospital on August 10, 1927, there was in effect between the Department of Interior of the United States of America and the Sanitarium Company, an Oregon corporation, which Company during all of the times hereinafter mentioned operated said Morningside Hospital, a contract dated December 14, 1923, and bearing the number No. 1 Sec-1½, providing for the care, custody, medical treatment and maintenance, during a period of five years from and including January 16, 1925, at a rate of \$52 per patient, per month, of such residents of Alaska as legally were adjudged insane and committed to the said hospital, and that the Department of the Interior and the said company entered into other similar contracts, bearing the dates and numbers and for the periods and at the rates per patient, per month, as follows: April 3, 1929 (No. 1 Sec-35), five years from and including January 16, 1930, at \$47; [124] May 22, 1934 (No. 1 Sec-143), one year from and including January 16, 1935, at \$47; June 8, 1935 (No. 1 Sec-168), one year from and includ-

ing January 16, 1936, at \$50; July 17, 1936 (No. 1 Sec-188), one year from and including January 16, 1937, at \$50; June 5, 1937 (No. 1 Sec-207), for the period beginning January 16, 1938, and ending June 30, 1943—unless sooner terminated, as therein provided—at \$54.

II.

That between the 10th day of August, 1927, and the 13th day of October, 1942, both dates inclusive, the said George Gartner, an insane person, was kept and maintained continuously in said hospital under said contracts; and that during said period last mentioned the plaintiff expended from the public funds and paid to said Morningside Hospital, under the said contracts, the total sum of Nine Thousand One Hundred Eighty and 11/100 Dollars (\$9,180.11) for the care and maintenance of the said George Gartner at said hospital, said payments being itemized as follows:

8/10/27 to	1/15/30 @ \$52.00 per month..	\$1,518.90
1/16/30 to	1/15/35 @ \$47.00 per month..	2,820.76
1/16/35 to	1/15/36 @ \$47.00 per month....	563.24
1/16/36 to	1/15/37 @ \$50.00 per month..	600.81
1/16/37 to	1/15/38 @ \$50.00 per month..	601.13
1/16/38 to	10/13/42 @ \$54.00 per month..	3,075.27

III.

It is specially agreed by the parties to this action that nothing in this stipulation contained shall be taken as establishing the reasonable cost of the care and maintenance of the said George Gartner at said

hospital during the period stated or as establishing the fact that the defendant, George Gartner, is indebted to the plaintiff in the said sum of \$9,180.11, or any other sum; and both parties reserve the right to produce at the trial of this cause whatever testimony they, or either of them, may see fit concerning such reasonable cost and/or indebtedness as aforesaid.

Dated at Fairbanks, Alaska, this 10th day of September, 1946.

/s/ HARRY O. AREND,

United States Attorney.

JOHN McGINN,

COLLINS & CLASBY,

By CHAS. J. CLASBY,

All Attorneys for the

Defendants.

[Endorsed]: Filed Sept. 12, 1946. [125]

[Title of District Court and Cause]

CERTIFICATE OF CLERK OF THE DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, John B. Hall, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, do hereby certify that the foregoing, consisting of 125 pages, constitutes a full, true, and correct transcript of the record on appeal in Cause No. 5368, entitled: United States of America, Plaintiff, versus George Gartner, an Insane Person, and Mike Erceg, Guardian of the Estate of George Gartner, an Insane Person, Defendants, and was made pursuant

to and in accordance with the Praeceptum of the defendant and appellant, filed in this action, and by virtue of the said Appeal and Citation issued in said cause, and is the return thereof in accordance therewith, and

I do further certify that the Index thereof, consisting of page "a", is a correct index of said Transcript of Record, and that the list of attorneys, as shown on page "b", is a correct list of the attorneys of record; also that the cost of preparing said transcript and this certificate, amounting to \$7.70, has been paid to me by counsel for appellant in this action.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court this 7th day of May, 1947.

[Seal] /s/ JOHN B. HALL,

Clerk, District Court, Territory of Alaska, 4th Division.

[Endorsed]: No. 11623. United States Circuit Court of Appeals for the Ninth Circuit. George Gartner, an Insane Person, and Mike Erceg, Guardian of the Estate of George Gartner, an Insane Person, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division.

Filed May 10, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals,
for the Ninth Circuit

No. 11623

GEORGE GARTNER, an Insane Person, and
MIKE ERCEG, Guardian of the Estate of
George Gartner, an Insane Person,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

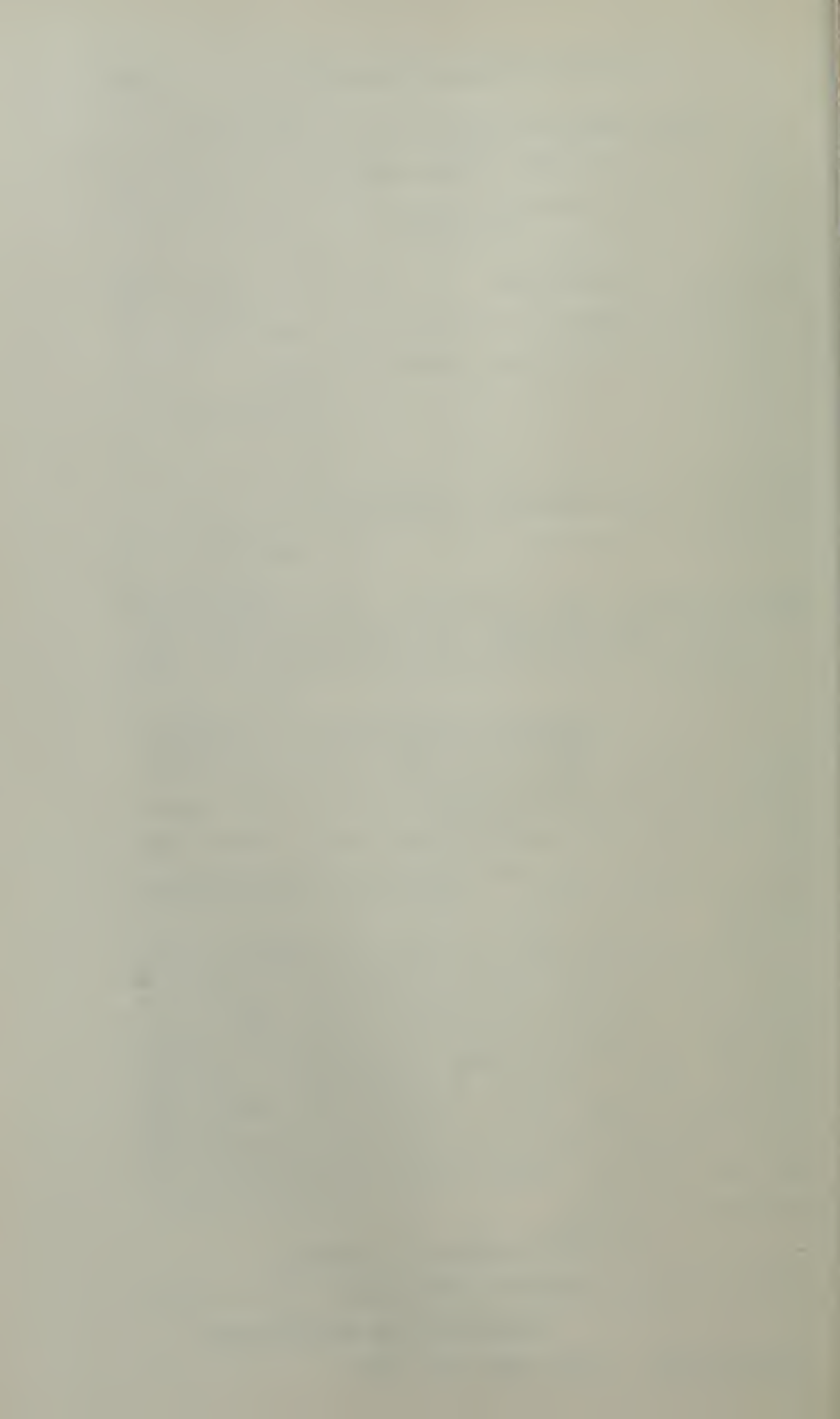
STATEMENT OF POINTS AND DESIGNA-
TION OF PARTS OF RECORD ON AP-
PEAL.

Appellants pursuant to subdivision 6 of Rule 19 of the Rules of this Court, file a statement of the points on which they intend to rely on this appeal and designate the parts of the record which they think necessary for the consideration thereof, as follows:

Appellants state that the points on which they intend to rely on this appeal are all those included in appellants' Assignment of Errors filed in this cause, and they hereby adopt said Assignment of Errors as such points and hereby designate the entire record as necessary for the consideration thereof, and that the transcript of the record be printed in its entirety as certified.

COLLINS & CLASBY,
/s/ JOHN L. MCGINN,
Attorneys for Appellants.

[Endorsed]: Filed May 28, 1947.



No. 11,623

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE GARTNER, an Insane Person, and
MIKE ERCEG, Guardian of the Estate of
George Gartner, an Insane Person,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS.

JOHN L. MCGINN,
COLLINS & CLASBY,
By CHAS. J. CLASBY,

540 Second Avenue, Fairbanks, Alaska,

Attorneys for Appellants.

FILED

AUG 20 1947

PAUL P. O'BRIEN,

CLERK

Subject Index

	Page
Complaint	2
Demurrer	3
Amended answer	3
Plaintiff's demurrer	4
Court directed verdict, for plaintiff, based entirely upon opinion evidence	4
Offers of proof to support affirmative defense rejected.....	5
Jurisdictional statement	6
Assignment of Error I. The court erred in overruling the demurrer of the defendants to the complaint of plaintiff upon the grounds that the court had no jurisdiction of the subject of the action, and that the complaint does not state facts sufficient to constitute a cause of action.....	6
Prerogatives of the King of England as parens patriae of idiots and lunatics before the revolution required that the lunatic be maintained out of the profits of his estate.....	7
Distinction between idiots and lunatics	8
The crown was under no duty or obligation as to indigent idiots and lunatics	11
The prerogatives of the crown after the revolution devolved upon the people of the states, and to the United States to the extent delegated by the states	13
Right of the United States to bring this action.....	16
United States seeks to recover upon a local law of Alaska....	18
Common law of England as to idiots and lunatics has never been in force in Alaska	24
Common law as to idiots and lunatics was never in force in Oregon	25
Special enactments of Oregon legislature as to insane and idiots	26
Guardians to be appointed for estates of insane or idiotic....	29

	Page
Applicability of the Oregon law to Alaska.....	29
Common law adopted for Alaska by the Act of June 6, 1900	30
Laws of Oregon in force in Alaska as to insane persons not repealed by the Act of June 6, 1900, except in part.....	31
Additional acts of Congress relating to insane.....	33
Congressional acts establishing procedure for determining insanity and for commitment of insane persons	34
Detention hospitals for temporary care.....	35
Law of Oregon abrogated	36
Common law repealed or abrogated by Act of Congress.....	37
Assignment of Errors II. (R. 96.) The court erred in sus- taining plaintiff's demurrer to defendants' first and second affirmative defenses stated in their amended answer upon the grounds that said defenses failed to state sufficient facts to constitute a defense.....	39
Gratuity and charity	41
The language of the acts of Congress as showing a gratuity..	41
Congressional construction	42
Silence and non-action	45
Executive construction	46
Contemporaneous construction	47
Right of public authorities to reimbursement at common law	50
Weight of authorities against recovery.....	51
Errors committed at the trial	54
Assignment of errors	54
Necessaries and services furnished Gartner.....	60
The court erred in denying appellants' offer to show that there were no profits in the Gartner case.....	61
Assignments of error	61
Assignment of Error XV (R. 113).....	63

Table of Authorities Cited

Cases	Pages
Aetna Casualty & Surety Co. v. Bramwell, 12 Fed. (2d) 308	19
Alaska Gold Mining Co. v. Ebner, 2 Alaska 611.....	30
Alger v. Miller, 5 Barb. 227	53
Alna v. Plumer, 4 Me. 258	53
Am. Ins. Co. v. Canter, 1 Pet. 511, 7 L. Ed. 242.....	18
Baker v. District of Columbia, 39 App. 42.....	52
Baldwin v. Douglas, 37 Neb. 283, 55 N. W. 875.....	52
Binns v. U. S., 194 U. S. 486, 48 L. Ed. 1087.....	24
Brown v. American Bonding Co., 210 Fed. 844.....	16
Brown's Committee v. Western State Hospital, 110 Va. 321, 66 S. E. 48 (1909)	51
Commissioners of Montgomery County v. Ristine, 124 Ind. 242, 24 N. E. 990.....	53
County of Glynn v. Brunswick Terminal Co., et al., 101 Ga. 244, 28 S. E. 604	21
Deer Isle v. Eaton, 12 Mass. 328	53
Doernbecher Mfg. Co. v. Commissioner of Internal Revenue, 95 Fed. (2d) 296	63
Evans v. Job, 8 Nev. 322	30
First Nat. Bank of Brunswick v. Yankton, 101 U. S. 129, 25 L. Ed. 1047	19
Fontain v. Ravenel, 58 U. S. 369	14, 15
Gatton v. Chicago, etc., 95 Ia. 112, 63 N. W. 589.....	13
Goodale v. Laurence, 88 N. Y. 513	53
Hoadly v. Chase, 126 Fed. 818.....	15
In re Barry, 42 Fed. 113	14
In re Burrus, 136 U. S. 586, 34 L. Ed. 500.....	14
In re Lord, etc. Co., 7 Del. 715	37
In re Lord, etc. Co., 7 Del. Ch. 248.....	38
In re Northern Bank, 148 N.Y.S. 70	21
In re Northern Bank, 212 N. Y. 608, 106 N. E. 749.....	21

	Pages
Leeper v. State, 103 Tenn. 528, 53 S. W. 962, 48 L.R.A. 167	21
Medford v. Learned, 12 Mass. 215	53
Morman Church v. U. S., 136 U. S. 1, 31 L. Ed. 464.....	14, 15
Neal v. Farmer, 9 Ga. 555.....	50
Peery v. Fletcher, 93 Or. 43, 182 P. 143.....	25
People v. Folsom, 5 Cal. 374	13
Phipps v. Harding, 70 Fed. 475, 30 L.R.A. 513.....	13
Poplin v. Hawks, 8 N. H. 305.....	53
President and Fellows of Harvard College v. Jewett, 11 F. (2d) 119	38
Schell's Executors v. Fauche, 138 U. S. 562.....	48
Spring Co. v. Edgar, 99 U. S. 658.....	65
State v. Bank of Tenn., 5 Baxt. (Tenn.) I	21
State v. Colligan, 128 Iowa 536, 104 N. W. 905.....	51
State v. Ikey, 84 Vt. 336, 79 A. 850	12
Swift v. Philadelphia, etc. R. Co., 64 Fed. 59.....	13
Templeton v. Stratton, 128 Mass. 137.....	53
Territory v. Lee, 2 Mont. 124	19
The Matter of Carnegie Trust Co., 206 N. Y. 390, 99 N. E. 1060, 46 L.R.A. (N.S.) 260	21
Town of Amherst v. Erie County, 238 N.Y.S. 76.....	48, 50
Transportation Co. v. Parkersburg et al., 107 U. S. 691, 27 L. Ed. 584	46
U. S. Fidelity & Guaranty Co. v. Bramwell, 217 Pac. 332...	21
U. S. Fidelity & Guaranty Co. v. Rainey, 120 Tenn. 357, 113 S. W. 297	21
U. S. v. New Bedford Bridge, 27 Fed. Cas. No. 15,867.....	13
United States v. Bank of North Carolina, 6 Pet. 29, 35, 8 L. Ed. 308	17
Wagner v. Bissell, 3 Iowa 395	29
Wheaton v. Peters, 8 Pet. 591, 8 L. Ed. 1055.....	13
Wheeler v. Smith, 9 Howard 55.....	14, 16
Wiseman v. State (Tex. Civ. App. 1936), 94 S. W. (2d) 265	52

Statutes	Pages
Carter's Code of Alaska :	
Part 3, Title 1, Ch. 1, Sec. 2, p. 132.....	32
Part 5, Ch. 36, Sec. 367, p. 432.....	31
Ch. LXXXVIII and LXXXIX, pp. 327, 333.....	32
p. 432	41
C.L.A. 1913, Sec. 410, p. 268	35
C.L.A. 1913, 'Sec. 796, p. 362	31
C.L.A. 1913, Sec. 797, p. 362	31
C.L.A. 1913, Sec. 831, p. 372	34
C.L.A. 1913, Secs. 832, 832a	35
C.L.A. 1913, pp. 1, 2 and Sec. 2593, p. 794.....	37
C.L.A. 1933, Sec. 1091	6
C.L.A. 1933, p. 897	35
C.L.A. 1933, p. 898	33, 35
C.L.A. 1933, Sec. 464, p. 166	35, 44
C.L.A. 1933, Sec. 3271, p. 660.....	18, 31
17 Edw. II, "St. Prerogativa Regis".....	7, 9, 12
Hill's Code :	
Sections 3549 to 3556	26, 32
Section 3557	26
Section 3558	28
Ch. XXIV, p. 1388 ^.....	29, 32
Ch. XXVIII, p. 1235 and Ch. XXIV, p. 1388.....	29, 32
Statutes of the Realm, Vol. 1, p. 81 :	
The Custody of Land of Idiots, C. XI.....	9
Of the Lands of Lunatics, C. XII	10
23 Stat. 24, 25, 26	25
31 Stat. 321, 552	30
33 Stat. 526	33
33 Stat. 619	2, 34
33 Stat. 620	34
34 Stat. 254	42
35 Stat. 601	2, 33
28 USCA 225	6
48 USCA 46	2, 33, 42
48 USCA 47	2

Texts	Pages
Bac. Abr. tit. Idiots and Lunatics C.....	12
I Black. Com. (Cooley's 4th Ed.) 240.....	22
I Blackstone Com. Ch. 9, 304	8, 9
4 C. J. 1398	30
12 C. J. 178, Sec. 5	50
12 C. J. 202, Sec. 35	50
22 C. J. 728, Sec. 823	65
32 C. J. 626	8
32 C. J. 627, Sec. 162	13
32 C. J. 626, Sec. 162, Note 87	7
46 C. J. 1212, Note 8	15
59 C. J. 888	37
59 C. J. 1028, Sec. 609	48
59 C. J. 1029	48
59 C. J. 1029, Sec. 609	48
65 C. J. 1254, Sec. 4	14
44 C. J. S. 175, Sec. 75	51
Fry's Lunacy Laws:	
3 Ed., pp. 7, 8	11
3 Ed., pp. 9, 10	11
3 Ed., p. 82	9, 10
4 Ed. (Lithiby), p. 5	7, 8
Pollock and Maitland's History of the English Law (Vol.	
I, p. 464)	11

No. 11,623

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE GARTNER, an Insane Person, and
MIKE ERCEG, Guardian of the Estate of
George Gartner, an Insane Person,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS.

George Gartner is an insane person, so adjudged by the Probate Court for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, on July 19, 1927, and ordered committed to Morningside Hospital at Portland, Oregon.

Ever since the year 1905 Congress has annually appropriated for sundry civil expenses of the government funds for the care and custody of persons legally adjudged insane in the District of Alaska including transportation and other expenses.

(NOTE) : Appellants were defendants below ; appellee, plaintiff. All emphasis in this brief is ours.

There was no act of Congress, during the time involved in this action, that authorized a charge to be imposed upon the insane patient, or his estate, for his care and support while confined in the hospital, under the direction of the Secretary of the Interior. This was conceded by plaintiff in the lower Court.

Plaintiff insists, however, that it is entitled to recover from Gartner or his estate, the reasonable cost of his care and maintenance, at Morningside, during the period involved, under the Common Law of Alaska.

COMPLAINT.

The complaint, after alleging that George Gartner was committed to Morningside Hospital on July 19, 1927, by the Probate Court for the Fairbanks Precinct, Fourth Division, Territory of Alaska, under the provisions of the Act of Congress of January 27, 1905 (33 Stat. 619; 48 USCA 47) and Act of February 6, 1909 (35 Stat. 601; 48 USCA 46), and the appointment of Mike Erceg as guardian of his estate, then alleges, in paragraph IV (R. 3, 4) as follows:

“That between said 10th day of August, 1927, and the 13th day of October, 1942, both dates inclusive, the plaintiff has expended the total sum of Nine Thousand One Hundred Eighty and 11/100 Dollars (\$9,180.11) for the care and maintenance of the said George Gartner at said Morningside Hospital, at Portland, Oregon; that said sum of \$9,180.11 is the reasonable cost of the care and maintenance of said defendant, George

Gartner, at said hospital during the period afore-said; and that said defendant, George Gartner, is justly indebted to the plaintiff in said sum of \$9,180.11.”

Then follows an allegation of demand, refusal to pay, and the usual prayer.

DEMURRER.

Defendants demurred to the complaint upon the grounds that it does not state facts sufficient to state a cause of action. (R. 5.)

The Court, in a written opinion (R. 6-20) overruled the demurrer, and this is the basis of Assignment of Error I. (R. 96.)

AMENDED ANSWER.

Defendants' amended answer after admitting the allegations of the complaint, except paragraph IV above quoted, set up the following affirmative defense (R. 22):

“That during all of the time mentioned in the Complaint, plaintiff by Congressional acts appropriated monies annually for the care and maintenance of insane persons who were adjudged to be insane, and ordered by reason thereof, to be committed to the Morningside Hospital at Portland, Oregon, by the Courts of Alaska. That said appropriations were made as a gratuity and charity and without any thought or expectation upon the part of Congress or plaintiff that any

part thereof was to be repaid to plaintiff by said insane person or his legal representative. That ever since the 'Act of May 17, 1884, providing for the Civil Government of Alaska' (23 Stats. 24), and up until the Act of Congress of October 14, 1942, (56 Stat. 782), relating to the care and maintenance of insane persons in Alaska, plaintiff never requested or made any demand, upon any insane person or his legal representative, for reimbursement for any monies that may have been expended by plaintiff for the care and maintenance of insane persons pursuant to the Acts of Congress. That by its acquiescence from the year of 1884 to the year of 1942 in said policy the plaintiff should not now be permitted to assert that monies expended by it as a gratuity and as a charity should be recovered from insane persons, their legal representatives, or relatives."

PLAINTIFF'S DEMURRER.

Plaintiff demurred to the affirmative defense upon the ground that it did not state facts sufficient to constitute a defense to the complaint (R. 25); which demurrer was sustained, and this is the basis of Assignment of Error II. (R. 96.)

COURT DIRECTED VERDICT, FOR PLAINTIFF, BASED ENTIRELY UPON OPINION EVIDENCE.

The issues above set forth were tried by the Court with a jury. The only witness called by the plaintiff was John LeRoy Haskins, a Civil Service employee

of the United States, Department of the Interior, stationed at Morningside Hospital since 1936 as a medical director; who testified that he specialized in psychiatry. His testimony showed that he had no personal knowledge of the actual cost incurred for the care and treatment of George Gartner, and no knowledge of any costs for the care and treatment of insane patients excepting from an examination of various government and other reports. This witness admitted, on cross-examination, that his "opinion" of the reasonable cost of the care of George Gartner was based "entirely" on the contract price for the per capita cost of the care of patients from Alaska entered into between the government and the Sanitarium Corporation, his testimony in that regard being as follows (R. 58):

"Q. Now I ask you, isn't your testimony based entirely upon the contract price?

A. What else would it be based on?"

Upon this opinion testimony alone the Court directed a verdict for plaintiff over objection by defendants.

**OFFERS OF PROOF TO SUPPORT AFFIRMATIVE
DEFENSE REJECTED.**

Defendants' motion for nonsuit having been overruled, defendants sought to introduce the testimony in support of the affirmative defense, which offers were rejected.

JURISDICTIONAL STATEMENT.

The District Court for the Territory of Alaska is a Court of general jurisdiction (Sec. 1091, CLA '33) in Civil, Criminal, equity and admiralty causes. The Circuit Court of Appeals (Ninth Circuit) has appellate jurisdiction to review by appeal the decisions of the District Court of Alaska. (28 USCA 225.)

ASSIGNMENT OF ERROR I.

THE COURT ERRED IN OVERRULING THE DEMURRER OF THE DEFENDANTS TO THE COMPLAINT OF PLAINTIFF UPON THE GROUNDS THAT THE COURT HAD NO JURISDICTION OF THE SUBJECT OF THE ACTION, AND THAT THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

As heretofore stated the United States is seeking to recover under the Common Law of England claimed to be in effect in the Territory of Alaska. The principal questions raised by the demurrer are:

a. Does the complaint fail to state a cause of action because it fails to allege that there were profits from the estate of Gartner out of which his care and support could be paid?

b. Has the United States, in its sovereign capacity and without statutory authority from Congress the right to recover from an insane person, or his estate, money expended under appropriations by Congress for the care and custody of the insane of Alaska?

A.

Our contention is that the complaint does not state a cause of action at Common Law for the reason that it fails to allege that there were profits accruing from George Gartner's estate out of which the costs of his maintenance could be paid. A consideration of this contention requires that we determine what the Common Law of England was on this subject.

**PREROGATIVES OF THE KING OF ENGLAND AS PARENS
PATRIAE OF IDIOTS AND LUNATICS BEFORE THE REVO-
LUTION REQUIRED THAT THE LUNATIC BE MAINTAINED
OUT OF THE PROFITS OF HIS ESTATE.**

Anciently in England, the custody of the person and property of idiots and lunatics, or at least of those who held lands, was not in the Crown but in the Lord of the fee. In the reign of Henry I, the King as *parens patriae*, or common curator of the realm, assumed exclusive jurisdiction of idiots and lunatics and their estates, and in the statute *De Prerogativa Regis* passed in the reign of Edward II (17 Edw. II, Ch. 9, 10) it was placed among the King's prerogatives.

32 *C. J.* 626, Sec. 162, Note 87;

Lithiby (*Fry's Lunacy Law* 4th Ed.) 5.

DISTINCTION BETWEEN IDIOTS AND LUNATICS.

The distinction between idiots and lunatics was at that time important.

“An idiot, or natural fool, is one that hath had no understanding from his nativity and therefore by law presumed never likely to attain it.”

“A Lunatic, or non compos mentis, is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason.”

I Blackstone Comm. Ch. 9, 304.

The custody of idiots and their lands as hereinbefore stated, was in ancient times not in the Crown but in the Lord of the fee. But, says Blackstone (Bk. I, p. 304) :

“By reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the King as the general conservator of his people; in order to prevent the idiot from wasting his estate, and reducing himself and his heirs to poverty and distress. This fiscal prerogative of the King is declared in Parliament by statute 17 Edw. II, 8, 9, which directs (in affirmance of the Common Law) that the King shall have ward of the lands of natural fools, taking the profits without waste or destruction and shall find them necessaries; and after the death of said idiots he shall render the estate to the heirs; in order to prevent such idiots from aliening their lands, and their heirs from being disinherited.”

Lithiby, *supra*, 5;

32 *C. J.* 626.

The King was also guardian to lunatics, but to a different purpose. Blackstone observes (Book I, p. 304:

“To these also as well as idiots, the King is guardian, but to a very different purpose. For the law always imagines that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives. And therefore it is declared by the statute 17 Edw. II, Ch. 10, that the King shall provide for the custody and sustenance of lunatics, and preserve their lands and profits of them for their use, when they come to their right mind; and the King shall take nothing to his own use; and if the parties die in such a state, the residue shall be distributed for their souls by the advice of the ordinary, and of course (by the subsequent amendments of the law of administration) shall now go to their executors or administrators.”

In Fry's Lunacy Laws (3 Ed.) p. 82, the author sets forth the statute 17 Edw. II, under the title “*St. Prerogativa Regis*,” which he states are a modern translation of the original statutes which were in Latin, and are printed in the Statutes of the Realm, Vol. 1, p. 81 of the new revised edition as Ch. XI and XII. They are as follows:

The Custody of Land of Idiots. C. XI.

“The King shall have the custody of the lands of natural fools, taking the profit of them with-

out waste or destruction, and shall find them necessaries, of whose fee soever the lands be holden; after the death of such idiots, he shall render it (the same) to the right heirs so that such idiots, shall not be aliene nor their heirs be disinherited."

Of the Lands of Lunatics. C. XII.

"Also the King shall provide, when any that beforetime hath had his wit and memory happen to fail of his wit: as there are many (with lucid intervals) that their lands and tenements shall be safely kept without waste or destruction and *that they and their household shall live and be maintained competently with the profits of the same and the residue besides their sustentation shall be kept to their use*, to be delivered unto them when they come to right mind; so that such lands and tenements shall in no wise (within the aforesaid time) be aliened, and the King shall take nothing (of the profits) to his own use. And if the party die in such estate, then the residue shall be distributed for his soul by the advice of the ordinary." (The words in parentheses are readings from different manuscripts, see: Fry's Lunacy Laws, p. 82.)

The difference between the two lies in this:

"That the Crown is required, in the case of the lunatic, to account for all the profits taking nothing for its own use (17 Edw. II, Ch. 12); whereas in the case of an idiot or natural fool no such obligation exists; (Ch. XI) for though the Crown is bound to preserve the estate for the benefit of the heirs, it is empowered to take the profit dur-

ing the life time of the idiot, subject to the condition of supplying him with necessaries.”

Fry Lunacy Laws (3 Ed.) 9, 10.

THE CROWN WAS UNDER NO DUTY OR OBLIGATION AS TO
INDIGENT IDIOTS AND LUNATICS.

“The care exercised by the Sovereign, such as it was, was confined to the case of idiots and lunatics possessed of estates; and neither the Common Law nor the statutes of Edw. II, took any notice of the idiot or lunatic poor for whom, indeed, no provision whatever was made until the present century. In so far as they were destitute, they were provided for like other destitute persons, by the Poor Law; but there was no special provision adapted to their particular affection.”

Fry Lunacy Laws (3 Ed.) 7, 8.

Fry also observes, that Blackstone's Commentaries were published in 1765, and it is worthy of notice that he treats this subject in the chapter devoted to the King's Revenue introducing it with this remark: “I proceed, therefore, to the eighteenth and last branch of the King's revenue which consists of the custody of idiots, from which we shall be naturally led to consider also the custody of lunatics.”

In Pollock and Maitland's History of the English Law (Vol. I, p. 464) it is said that this document known as *praerogativa regis* seems to be the oldest that gives any clear information about the wardship of lunatics.

“The King is to provide that the lunatic and his family are properly maintained out of the income of his estate, and the residue of it is to be handed over to him upon his restoration to sanity, or should he die without having recovered his wits, for the good of his soul; but the King is to take nothing to his own use.” Bac. Abr. tit. Idiots and Lunatics C.

See, *State v. Ikey*, 84 Vt. 336, 79 A. 850.

It is clear that the object of Statute 17 Edw. II, was to regulate and define the King's Prerogative, and to restrain the abuse of treating the estates of lunatics the same as the estates of idiots. From the foregoing authorities it is manifest *that the King became the trustee of the lunatic and was only entitled to deduct the cost of his care and support from the profits of the estate.* This being so it was necessary for the plaintiff in this action, in order to state a cause of action, to allege and prove that there were profits derived from the estate in an amount sufficient to pay for his care and keep.

B.

Has the United States, in its sovereign capacity and without statutory authority from Congress the right to recover from an insane person, or his estate, money expended under appropriations by Congress for the care and custody of the insane of Alaska?

This involves a consideration of the extent to which the Prerogatives of the Crown have become rights enforceable by the United States, in this action in Alaska, in the absence of congressional enactments.

THE PREROGATIVES OF THE CROWN AFTER THE REVOLUTION DEVOLVED UPON THE PEOPLE OF THE STATES, AND TO THE UNITED STATES TO THE EXTENT DELEGATED BY THE STATES.

In the United States, after the revolution, the care and custody of persons of unsound mind and the control of their estates, which had belonged to the King as a part of his prerogative, as *parens patriae*, became vested in the people of the different states. If the people did not vest this jurisdiction in the Courts by the constitution they left it with the legislature who vested it in the Courts.

32 *C. J.* 627, Sec. 162.

There is no Common Law of the United States. There is no principle which pervades the union and has the authority of law that is not embodied in the Constitution or laws of Congress. The Common Law can be made a part of the Federal system only by legislative adoption.

Wheaton v. Peters, 8 Pet. 591, 658, 8 L. Ed. 1055;

U. S. v. New Bedford Bridge, 27 Fed. Cas. No. 15,867;

Swift v. Philadelphia, etc. R. Co., 64 Fed. 59;
Phipps v. Harding, 70 Fed. 475, 30 L.R.A. 513, 518;

People v. Folsom, 5 Cal. 374, 379;

Gatton v. Chicago, etc., 95 Ia. 112, 63 N.W. 589, 590.

“The United States has no inherent sovereign powers, and no inherent Common Law prerogatives; and it has no power to interfere in the per-

sonal and social relations of citizens by virtue of authority deducible from the general nature of sovereignty; but it has so much of the royal prerogatives as belong to the King of England in his capacity of *parens patriae* or universal trustee. * * * It has been said that the United States takes no power or authority from State constitutions or laws.”

65 *C. J.* 1254, Sec. 4;

In re Burrus, 136 U. S. 586, 34 L. Ed. 500;

In re Barry, 42 Fed. 113, 118.

The sovereign will of the Federal Government is made known by legislative enactments. As was said in *Wheeler v. Smith*, 9 Howard 55, 78, 79, by the Supreme Court of the United States:

“When this country achieved its independence, the prerogatives of the Crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the Federal Government. The sovereign will is *made known to us by legislative enactment. And to this we must look in our Judicial action instead of the prerogatives of the Crown.* The State, as sovereign is the *parens patriae.*”

See also, *Fontain v. Ravenel*, 58 U. S. 369, 384.

In the *Morman Church v. U. S.*, 136 U. S. 1, 57 (31 L. Ed. 464, 496), the Court said:

“This prerogative of *parens patriae* is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the legislature and has no affinity to those arbitrary

powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and the destruction to their liberties * * *."

In *Fontain v. Ravenel*, supra, p. 384, the Court said:

"These prerogative powers which belong to the sovereign as *parens patriae* remain with the state * * * . But state laws will not authorize the Court of the United States to exercise any power that is not in its nature judicial; nor can they confer on them prerogative power over minors, idiots and lunatics or charity, which the English Chancellor possessed."

"The doctrine of *parens patriae* * * * may be defined as the inherent power of the legislature of a State to provide protection of the person and property of persons non sui juris such as minors, insane and incompetent persons."

46 *C. J.* 1212, Note 8.

The National government has power of *parens patriae* in the Territory of Alaska. In *Mormon Church v. U. S.*, supra, in a case arising in the then Territory of Utah, the United States Supreme Court held that the National government has the power of *parens patriae* in the Territory of Utah, that that power resident in the States ordinarily, resided in the National government so far as the Territories of the United States are concerned.

Hoadly v. Chase, 126 Fed. 818, 820.

RIGHT OF THE UNITED STATES TO BRING THIS ACTION.

The Supreme Court of the United States in *Wheeler v. Smith*, 9 How. 78, *supra*, after stating that the prerogatives of the Crown, as *parens patriae*, devolved upon the States and that this power still remains with them, except in so far as they have delegated a part of it to the Federal Government, then says:

“The sovereign will is made known to us by legislative enactment. *And to this we must look in our judicial action, instead of the prerogatives of the crown.* The State, as a sovereign is the *parens patriae*.”

There is considerable conflict between the various states as to whether the states have succeeded to the royal prerogatives of the British Crown, by the adoption in the State of the Common Law. In other words as to whether by adopting the Common Law in the State it carried with it the King's prerogatives.

In *Brown v. American Bonding Co.*, 210 Fed. 844, this Court had under consideration the question whether the State of Montana, by adopting the Common Law by legislative enactment, succeeded to the prerogatives of the British Crown that gave the Crown a preference for a debt due it over other creditors. The Court held that it did not, although the Supreme Court of that State had held to the contrary.

In its opinion this Court quoted the language of the Supreme Court of the United States in *United*

States v. Bank of North Carolina, 6 Pet. 29, 35 (8 L. Ed. 308) as follows:

“The right of priority of payment of debts due to the government is a prerogative of the Crown well known to the Common Law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens, and discharge the public debt. The claim of the United States, however, *does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statute.* The same policy which governed in the case of the royal prerogative may be clearly traced in these statutes, and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation according to the just import of their terms.”

This Court then continues as follows:

“If, as there expressly held by the Supreme Court, the priority of debts due the government of the United States does not stand upon any sovereign prerogative, but is exclusively founded upon their own statutes, we are unable to understand how the right of priority of payment of debts due a state can be founded upon such a prerogative. Surely no state can have any greater sovereign right than the general government of the entire country.”

UNITED STATES SEEKS TO RECOVER UPON A
LOCAL LAW OF ALASKA.

Plaintiff conceded at the trial that its cause of action is not founded on any statute of the United States. Plaintiff seeks to recover under Sec. 3271 of the Compiled Laws of Alaska, 1933, that provides:

“So much of the Common Law as is applicable and not inconsistent with the constitution of the United States or with any law passed, or to be passed, by Congress or the Legislature of Alaska, is adopted and declared to be the law in the Territory.”

The District Court, in its written opinion, states that the question involved, is as follows:

“As our code made the Common Law of England except as modified by statute, the law of Alaska during all time concerned in this case, it becomes necessary to ascertain what the Common Law was with reference to reimbursement of the sovereign for expenses incurred in the care of an insane person.” (R. 7.)

The Common Law of Alaska is not a law of the United States. It is a local municipal law of the Territory prescribed by the supreme power, the Congress of the United States, for the benefit of the inhabitants of Alaska.

The Supreme Court of the United States, in *Am. Ins. Co. v. Canter*, 1 Pet. 511, 546 (7 L. Ed. 242, 256), said through Marshall, C. J. that:

“Congress in legislating for them (Territories) exercises the combined powers of the general and state government.”

Congress, in giving the Territories an Organic Act, does not and cannot delegate any of its sovereign authority; for not only can the organic acts be altered or abolished, but all laws made under and by virtue thereof by the Territorial legislature, are subject to Congressional supervision, showing that sovereignty alone resides with Congress.

Territory v. Lee, 2 Mont. 124, 133.

The relation of the Territories to the United States is said to be that which *countries bear to the respective states*.

“The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations.”

First Nat. Bank of Brunswick v. Yankton, 101 U. S. 129, 133, 25 L. Ed. 1047.

In *Aetna Casualty & Surety Co. v. Bramwell*, 12 Fed. (2d) 308, 309, the question presented was whether a county of the state of Oregon had the same right of preference with respect to deposits in banks, which the state enjoys in its sovereign capacity, the Supreme Court of that state having previously held that under the Common Law in force there that the state is entitled to a preference *as a prerogative right* over unsecured creditors. Judge Wolverton, in his opinion, said:

“It is said that there is no Common Law as to the national government, but that generally it

does obtain as to the states. *So that, while it is requisite that Congress declare by law that the general government shall have priority with respect to claims against insolvents, etc., it is argued that the states possess that privilege or right in pursuance of the Common Law in the absence of appropriate legislation to the contrary. And such is the holding of the Supreme Court of this state.*”

“However, prerogative where it exists appertains to sovereignty. The State is the sovereign. Does that prerogative appertain to the counties of the state? * * * It has received judicial consideration in several of the states. The most recent case treating of the subject is *Bignell v. Cummings*, 69 Mont. 294; 222 P. 797, the opinion is by Callaway, C. J., and is exhaustive and able. It should be premised that that state is one of those concurring with the state of Oregon in the principle that the prerogative right of priority respecting public funds obtains by virtue of the Common Law. *State v. Madison State Bank*, 68 Mont. 342, 218 P. 652. * * * In the *Bignell* case it was held that this prerogative did not extend to the counties of the state. In support thereof the learned Chief Justice had this to say: ‘Sovereignty must involve the general interest of the state at large. It is true that the whole state has an interest in the proper administration of its law everywhere within its borders, and so it has an interest in the proper government of every county, and so it has in every municipality, and in the conduct of every school district, and in the prosperity of every citizen. But, while the prerogative of the state may be invoked for the protection of the

rights of the county, municipality, school district, and citizen, it does not follow that any of these possess that power. *It must be held that the sovereign right, the prerogative, is lodged in the political power which is created by and is the representative of all the people, the state itself, and that the prerogative of the state may not be exercised by its creature, in the absence of express authority granted to the creature.*' It is further asserted by the court that the county is but a creature of the state, which may be abolished by the will of the state, *and that the statutes constitute the charter of a county's power, and to them it must look for the evidence of any authority sought to be exercised.*"

See also:

County of Glynn v. Brunswick Terminal Co., et al., 101 Ga. 244, 28 S.E. 604;

U. S. Fidelity & Guaranty Co. v. Rainey, 120 Ten. 357, 405, 113 S.W. 297;

State v. Bank of Tenn., 5 Baxt. (Tenn.) I;

Leeper v. State, 103 Tenn. 528, 53 S.W. 962, 48 L.R.A. 167;

The Matter of Carnegie Trust Co., 206 N.Y. 390, 99 N.E. 1060, 46 L.R.A. (N.S.) 260;

In re Northern Bank, 148 N.Y.S. 70;

Id., 212 N.Y. 608, 106 N.E. 749.

In *U. S. Fidelity & Guaranty Co. v. Bramwell*, 217 Pac. 332, the Supreme Court of Oregon, after holding that the Common Law of England, with limitations, had been adopted in that State, in speaking of the royal prerogatives of the British Crown, points out

that according to Blackstone, they were of two classes, viz.:

(335) "Prerogatives are either direct or incidental. The direct are such positive substantial parts of the royal character and authority as are rooted in and spring from the King's political person, considered merely by itself, without reference to any other extrinsic circumstance; as the right of sending ambassadors, of creating peers, and of making war or peace. But such prerogatives as are incidental bear always a relation to something else distinct from the king's person; and are indeed only exceptions, in favor of the crown to those general rules that are established for the rest of the community; such as, that no cost shall be recovered against the king; that the king can never be a joint tenant; and that his debt shall be preferred before a debt to any of his subjects." I Black. Com. (Cooley's 4th Ed.) 240.

The Oregon Court then states that it is clear that none of the royal prerogatives that are classified as direct, by Blackstone, are adapted to or suitable for our needs and conditions, and hence, the Common Law rules by which these prerogatives were established and maintained are not in force in this state; but that the incidental prerogatives which have no relation to the King's person and constitute exceptions in favor of the Crown and which from their very nature, are essential to the welfare of the people of the state have been adopted, and the Common Law rules by which these rights were established have become the law of the State.

There is considerable conflict of opinion in the States as to whether or not the prerogatives of the King which became vested in the people of the States in inherent in the sovereignty of the States or must rest upon legislative enactment.

The Supreme Court of Oregon holds that the prerogatives which are adapted to the circumstances, conditions and necessities of the people, because essential to sustain the public burdens and discharge the public debts, became a part of the law of that State by virtue of the Common Law. *The Court then proceeds to point out that the rule as to the United States is different and that before the right can prevail* in favor of the National Government it must rest exclusively upon a Federal Statute. The language of the Court being as follows:

(338) “As to the government of the United States, the rule is different. Before the right can prevail in favor of the National Government, it must rest exclusively upon a Federal statute, for in *United States v. Bank of North Carolina*, 31 U. S. 19 (6 Pet. 29), 8 L. Ed. 308, the Court said:

‘The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes.’

From this the defendant argues that there must be a state statute conferring this right upon the state before the right can exist in favor of the state. But it is pointed out in *U. S. Fid. & Guar. Co. v. Borough Bank of Brooklyn*, 161 App. Div. 479, 486; 146 N. Y. Suppl. 870, 875; that the reason for the priority right of the Federal Gov-

ernment being dependent upon, and not existing independently of, a Federal statute, is the fact that—

‘There is no Common Law of the United States, in the sense of a national customary law, distinct from the Common Law of England as adopted by the several states each for itself, applied as its local law.’ (Citing cases.)

As the Federal Government does not have a customary Common Law of its own, distinct from that of the states themselves, it necessarily results that the right itself must depend exclusively upon a federal statute, * * *.”

In the light of these authorities it must be deemed that the United States stands in the relation of *parens patriae* with respect to insane persons in the Territory of Alaska, and that the prerogative of *parens patriae* can only be exercised by Acts of Congress. Plaintiff concedes that there is no statute, Federal or Territorial, which in express terms authorizes a recovery in the instant case.

COMMON LAW OF ENGLAND AS TO IDIOTS AND LUNATICS
HAS NEVER BEEN IN FORCE IN ALASKA.

Alaska was ceded to the United States by Russia on June 20, 1867. It became an Organized Territory of the United States, when the Act of May 17, 1884, entitled “An Act Providing for Civil Government for Alaska” was approved.

Binns v. U. S., 194 U.S. 486, 491, 48 L. Ed. 1087.

Section 7, of the Act of May 17, 1884, adopted the general laws of Oregon for the then District of Alaska. It provided:

“That the general laws of the State of Oregon now in force are hereby declared to be the law in said District in so far as the same may be applicable and not in conflict with the provisions of this Act, or the laws of the United States.” (23 Stat. 24, 25, 26.)

COMMON LAW AS TO IDIOTS AND LUNATICS WAS
NEVER IN FORCE IN OREGON.

The Common Law was in force, in Oregon, on May 17, 1884, to the extent only, as declared by the Supreme Court of that State, in *Peery v. Fletcher*, 93 Or. 43, 182 P. 143, as follows:

(147) “In many jurisdictions in the United States the rules of the Common Law of England have been held by the Courts to be in full force so far as the same are applicable and of a general nature, and are not in conflict with the Constitution or special enactments of the Legislature. *This is the rule in Oregon.* See note, 30 Ann. Cas. 1913 E. 1232, 1241; *Brummet v. Weaver*, 2 Or. 168; *Rugh v. Ottenheimer*, 6 Or. 231; *Velten v. Carmack*, 23 Or. 282; 31 Pac. 658, 20 L.R.A. 101.”

Under this rule the Common Law was in force in Oregon on May 17, 1884, to the extent only it was applicable and of a general nature, and *not in conflict with the Constitution or special enactments of the Legislature.*

SPECIAL ENACTMENTS OF OREGON LEGISLATURE
AS TO INSANE AND IDIOTS.

The special enactments of the Legislature of Oregon, on May 17, 1884, covered the entire subject matter. They provided for a board of trustees, consisting of a Governor, the Secretary of State,* and State Treasurer,* to be known as the "Board of Trustees of the Oregon State Insane Asylum." The trustees were authorized to receive, take and hold property, in trust for the State, and for the benefit of the asylum. They had the power to govern, manage and administer the affairs of the asylum; make and adopt by-laws for their government and the government of the asylum. They had the power to appoint all officers and employees of the asylum and to appoint a medical superintendent and assistant.

The powers and duties of the trustees are set forth in Sections 3549 to 3556, of Hill's Ann. Laws of Or. (1887) Ch. XLIX, p. 540, and we deem it unnecessary to set them forth in greater detail here.

Section 3557 of Hill's Ann. Laws (1887) was not in force in Oregon on May 17, 1884. Upon that day Section 3 of the Act of October 18, 1878 was in force. (Laws of Or. 1878.) The first part of Section 3 of the Act of 1878 was very similar in substance to Section 3557 above referred to, and it provided that the County Judge, upon the application of any citizen setting forth that any person or persons by reason of insanity or idiocy, is suffering from neglect, exposure,

*Clerk of District Court, by Act of 1884 (Sec. 4), was made ex-officio Secretary and Treasurer of the District of Alaska.

or otherwise, or is unsafe to be at large, shall cause said person to be brought before him, at such time and place as he may direct, and that said County Judge shall also cause to appear at said time and place one or more competent physicians, who shall proceed to examine the person or persons alleged to be insane or idiots, and if said physician or physicians, after careful examination, shall certify upon oath, that said person or persons are insane or idiotic, as the case may be, then the Judge, if in his opinion said person or persons be insane or idiotic, shall cause said person or persons to be placed in the insane asylum in the State of Oregon.

The latter part of Section 3 of the Act of October, 1878, contains a proviso in substance as follows:

“Provided, further, that the County Judge shall make diligent inquiry, and when an insane or idiotic person, committed under this Act, shall be found to own any estate, real or personal, said Judge shall immediately, without petition or notice, appoint a guardian for the estate of such person, who shall execute his trust, under the direction of said court, make the same returns and give the same security as in the case of a minor, and said estate shall be liable to the County for the cost of such commitment, and to the State for the cost of conveying such insane or idiotic person to the asylum, and keeping him while there. In case there be a wife and child or children, or either, dependent on said estate for support, the County court shall make proper allowance for their support out of the estate. A husband shall be liable to the County for the cost

of committing his insane or idiotic wife to the asylum, and to the State for the cost of conveying her to the asylum, and keeping her while there; and parents of minor children committed as insane or idiotic shall be in like manner liable to the County for the cost of such commitment; and to the State for the cost of conveying such insane or idiotic minor children to the asylum, and keeping them while there. The State shall hold a lien in the nature of a judgment against the estate of a husband, for the cost of sending his wife to the asylum, and keeping her there, when committed as insane or idiotic, and against the estate of parents for the cost of sending their minor children to the asylum, and keeping them there, when committed as insane or idiotic. It shall be the duty of the prosecuting attorney for each judicial district to cause to be appointed the guardian herein provided, etc.”

The Oregon Law also provided on May 17, 1884, in Section 3558, Hill's Code, *supra*, that the County Judge should enter in the records the proceedings had upon such application, and required him to make a warrant reciting his findings, etc., the cause of insanity, the name, age, nativity, and residence of the insane person and that the warrant should be recorded; and that a copy thereof must be sent with the patient to the superintendent of the asylum and another to the Secretary of the State, to be filed in his office.

GUARDIANS TO BE APPOINTED FOR ESTATES OF
INSANE OR IDIOTIC.

The laws of Oregon on May 17, 1884, providing for the appointment of guardians for insane persons and for the protection of their person and property are set forth in Title 3, Ch. XXVIII, p. 1235, and Ch. XXIV, p. 1388, of Hill's Code.

APPLICABILITY OF THE OREGON LAW TO ALASKA.

The general laws of Oregon as of May 17, 1884, so far as applicable and not in conflict with that Act or the Laws of the United States were adopted for the District of Alaska. Were the laws of Oregon as above summarized, in conflict with the Act or the Laws of the United States? That they were not in conflict is obvious, for there was no law of the United States on that subject, and the Act made no provision therefor except to adopt the general laws of Oregon.

That the Oregon laws were applicable there can be no doubt, as is evident from the following quotations:

“The term ‘applicable’ as used in the doctrine that the Common Law is adopted only so far as it is applicable to us as a people and may be of a general nature, means that in adopting the Common Law it must be applicable to the habits and conditions of our society and in harmony with the genius, spirit and objects of our institutions.”

Wagner v. Bissell, 3 Iowa 395, 402.

“A general law should always be construed to be applicable in the constitutional sense where the

entire people of the state have an interest in the subject, such as regulating interest, the statute of frauds and limitations, etc.”

Evans v. Job, 8 Nev. 322, 336;

Alaska Gold Mining Co. v. Ebner, 2 Alaska 611;

4 C. J. 1398.

The Oregon laws were of a general nature and applicable to the habits and conditions of the people of Alaska and in sympathy with the spirit and object of its institutions. *They became a part of the general law of Alaska.*

Under the Act of May 17, 1884, the Common Law was not adopted for Alaska. It, therefore, follows that the laws of Oregon became a part of the Laws of Alaska, as to insane persons, or there was no law in Alaska covering that subject, until June 6, 1900.

COMMON LAW ADOPTED FOR ALASKA BY THE
ACT OF JUNE 6, 1900.

The Common Law was not adopted by Congress for Alaska, until the Act of June 6, 1900, entitled “An Act Making Further Provision for a Civil Government for Alaska and For Other Purposes” (31 Stat. 321, 552), was enacted.

The Act provides that:

“So much of the Common Law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be

passed by the Congress is adopted and declared to be law within the District of Alaska.” (C.L.A. 1913, Sec. 796, p. 362.)

This section was amended by the Legislature of Alaska in 1933, by inserting after the word “Congress” the words “or the Legislature of Alaska.” (C.L.A. 1933, Sec. 3271, p. 660.)

LAWS OF OREGON IN FORCE IN ALASKA AS TO INSANE PERSONS NOT REPEALED BY THE ACT OF JUNE 6, 1900, EXCEPT IN PART.

The Act of June 6, 1900, contained a repeal clause in words as follows:

“* * * All Acts or parts of Acts in conflict with the provisions of this Act are hereby repealed.”

Carter’s Code Part 5, Ch. 36, Sec. 367, p. 432;
C.L.A. 1913, Sec. 797, p. 362.

The Act of June 6, 1900, provided that:

“He (Governor) shall, subject to the direction and approval of the Secretary of the Interior, advertise for and receive bids and, in behalf of the United States, contract from year to year with a responsible asylum or sanitarium west of the main range of the Rocky Mountains submitting the lowest bid for the care of persons legally adjudged insane in said District of Alaska; the cost of advertising for bids, executing the contract and caring for the insane to be paid, until otherwise provided by law, by the Secretary of the Treasury, out of any money in the treasury not otherwise appropriated, on accounts and

vouchers duly approved by the Governor and the Secretary of the Interior.”

Carter’s Code of Alaska, Part 3, Title 1, Ch. 1, Sec. 2, p. 132.

The above provision being in conflict with Sections 3549 to 3556, of Hill’s Code, *supra*, providing for the maintenance and management of a State Insane Asylum necessarily repealed them.

The Act of June 6, 1900, reenacted the provisions of the Oregon Code for the appointments of guardians for the protection of the persons and estates of the insane and by so doing continued them in force. Chapters XXVIII of Title 3, p. 1235 and Ch. XXIV, p. 1388 of Hill’s Code, became Ch. LXXXVIII and LXXXIX of Carter’s Code, pp. 327, 333.

There was no provision in the Act of June 6, 1900, for a judicial hearing to determine the question of insanity and for the commitment of insane persons to an asylum, or any provision for reimbursement for the cost of his care and support, etc., so consequently the Laws of Oregon providing therefor remained in full force and effect as they were not in conflict with the Act of June 6, 1900.

The laws of Alaska relating to insane persons as of June 6, 1900, therefore, provided: (a) by an Act of Congress for the care and treatment of persons adjudged insane in Alaska, by contract; (b) for the appointment of guardians to protect the persons and estates of insane persons; and (c) the laws of Oregon as to a judicial hearing to determine the question of

insanity and the procedure in regard to committing an insane person to the asylum remained in full force and effect.

ADDITIONAL ACTS OF CONGRESS RELATING TO INSANE.

That portion of the Act of June 6, 1900, above quoted, authorizing the Governor, subject to the direction and approval of the Secretary of the Interior, to advertise for and receive bids, etc., was amended by the Act of April 28, 1904 (33 Stat. 526) and finally amended by the Act of February 6, 1909 (35 Stat. 601) and, as so amended, reads as follows:

“The Secretary of the Interior shall hereafter as in his judgment may be deemed advisable, advertise for and receive bids for the care and custody of persons legally adjudged insane in the Territory of Alaska, and in behalf of the United States shall contract, for one or more years, as he may deem best, with a responsible asylum or sanitarium west of the main range of the Rocky Mountains, submitting the lowest and best responsible bid for the care and custody of persons legally adjudged insane in the Territory of Alaska, the cost of advertising the bids, executing the contract, *and caring for the insane to be paid from the appropriations to be made for such service upon estimates to be submitted to Congress annually.*” (Feb. 26, 1909, Ch. 80, Sec. 7; 35 Stat. 601; 48 U.S.C.A., Sec. 46; C.L.A. '33, p. 898.

CONGRESSIONAL ACTS ESTABLISHING PROCEDURE FOR DETERMINING INSANITY AND FOR COMMITMENT OF INSANE PERSONS.

Congress by the Act of January 27, 1905 (33 Stat. 619, 620; C.L.A. 1913, Sec. 831, p. 372), conferred upon the Commissioners, appointed by the Judges of the District Court in Alaska, as ex-officio probate judges, power to commit by warrant all persons adjudged insane in their district to the asylums or sanitariums provided for the care and keeping of the insane of Alaska.

The Act prescribed the procedure to be followed in detail requiring a complaint in writing, a trial by jury, the appointment of a suitable attorney before trial to represent the person complained against, the examination of the person before trial by a physician or surgeon, if procurable, and the testimony under oath of the physician or surgeon, after the examination and before the jury as to the mental condition of the person.

It also provided that the commissioners preside at the hearing and trial; that all witnesses must testify under oath and that after testimony had been heard, that the jury shall retire to agree upon their verdict; and if the jury unanimously, by their verdict in writing, find the person so charged with being insane is really and truly insane and that he ought to be committed to the designated asylum or sanitarium, and the commissioner approves such finding, he shall enter judgment adjudging said person to be insane and that he be at once conveyed to and thereafter properly

and safely kept in said asylum or sanitarium until duly discharged.

That the commissioner shall thereupon issue a warrant, with a copy of the judgment attached, for the commitment of the insane to said asylum or sanitarium; which warrant shall be delivered to the Marshall of the division to execute the same. That the cost of the same shall be paid by the Clerk of the Court as incidental expenses.

DETENTION HOSPITALS FOR TEMPORARY CARE.

The Act of June 25, 1910, provides for the establishment of a detention hospital at Fairbanks and Nome for the temporary care and detention of the insane and also for a Board of Construction to consist of the District Judge and the U. S. Marshal of the judicial divisions in which the detention hospital shall be built. (C.L.A. 1913, Sec. 832, 832a; C.L.A. 1933, pp. 897, 898.

Congress having fully legislated upon the subject seems to have been well satisfied with the enactments and also of the policy of paying for the care and support of the insane by annual appropriations. We assert this to be so because in the Act of August 12, 1912 (C.L.A. 1913, p. 268, Sec. 410; C.L.A. 1933, p. 166, Sec. 464), it is provided among other things:

“That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend * * * to the

‘care and support of insane persons in the District of Alaska, and for other purposes,’ approved January 27, 1905, and the several acts amendatory thereof.”

These are the statutory enactments of Congress that have been in force in Alaska since 1905, and up to October 14, 1942. They cover the whole subject matter of the care, custody and support of the insane, except the statutes making annual appropriations for the payment of their care and support. Prior to the Congressional Acts, the laws of Oregon likewise covered the whole subject matter, until they were abrogated and superceded by the Acts of Congress hereinbefore set forth. *Therefore the Common Law as to idiots and lunatics is not and never has been in force in Alaska.*

LAW OF OREGON ABROGATED.

The congressional Acts as to insane persons, comprehending as they do the entire subject, superceded and abrogated the Oregon Laws then in force in Alaska covering the same subject including the provision requiring the insane to pay for their keep at the asylum. If there is any doubt about this it is foreclosed by the fact that none of the Oregon laws relating to the insane and idiotic were included in the “Compiled Laws of the Territory of Alaska 1913,” that were codified, compiled, arranged and published under the Act of Congress of August 24, 1912.

See, pp. 1, 2 and Sec. 2593, p. 794, C.L.A. 1913.

“The code or revision is intended to take the place of the law as previously formulated, and to include all statute law * * * of a general or permanent nature, up to the time of its adoption.”

59 C. J. 888.

COMMON LAW REPEALED OR ABROGATED BY
ACT OF CONGRESS.

The Congressional Laws undertake to regulate the care and custody of the insane and agrees with the Common Law in some particulars and disagrees as to others. Insofar as they agree there is no concurrent authority. The Congressional Law prevails. The Congressional Laws are not a supplement, but a substitution. If the Congressional Law undertakes to cover in a specific manner things already covered by the Common Law and omits therefrom certain matters also covered by the Common Law, such omission must be considered a legislative repeal or abrogation of the omitted parts.

In the case of *In Re Lord, etc. Co.*, 7 Del. 715, it was held that where the statute and the Common Law differ, the statute prevails; and that, where the statute undertakes to regulate the conduct of a matter covered by the Common Law and omits a part of it, the omission will be taken as an intention to repeal or abrogate it. The Court illustrates its view as follows:

“Take, for example, our own Statute of Frauds. It does not contain some of the provisions of the English Statute, but the *omitted parts* thereof,

for the reason above stated, have never been held to be in force in this state since the enactment of our own statute.”

In Re Lord, etc., Co., 7 Del. Ch. 248.

“Common Law can neither add to nor take from statutory rule, when legislature has assumed to establish rules of property or conduct.”

President and Fellows of Harvard College v. Jewett, 11 F. (2d) 119, 123.

It follows therefore that if the rule at Common Law is as contended by plaintiff, then the omission of Congress to reenact that part that allows re-imbursement for reasonable costs, out of profits show an intent on the part of Congress to repeal and abrogate the omitted part. Particularly is this true in view of the fact that the Act of Congress of January 27, 1905, contains a repeal clause as follows:

“That all Acts and parts of Acts inconsistent with this Act are to the extent of such inconsistencies repealed (33 Stat. 619).”

Surely the intent of the Congress that the cost of the care and custody of the insane shall be paid as a Civil expense of Government from public funds is inconsistent with the Government’s present contention that it is entitled to recover from the defendant the reasonable cost of his care and keep.

ASSIGNMENT OF ERRORS.

II. (R. 96.) THE COURT ERRED IN SUSTAINING PLAINTIFF'S DEMURRER TO DEFENDANTS' FIRST AND SECOND AFFIRMATIVE DEFENSES STATED IN THEIR AMENDED ANSWER UPON THE GROUNDS THAT SAID DEFENSES FAILED TO STATE SUFFICIENT FACTS TO CONSTITUTE A DEFENSE.

"XIII. (R. 111.) The Court erred in refusing to permit testimony on the part of Defendants by the witness Clegg to establish that Plaintiff had never before in the history of Alaska claimed recompense from the estates of insane persons for care prior to 1942, the proceedings relating thereto being as follows:

'Q. And in your experience do you know personally, or have you ever heard of any law suit or claim having been made by the federal government for recompense from the estate of insane persons of the cost of the care and maintenance of those persons in Morningside prior to the year 1942.

Mr. Arend: If the Court please, we object to the question as irrelevant, incompetent, immaterial and not in issue in this case.

The Court: Objection sustained.' "

"XIV. (R. 112.) The Court erred in refusing the offer of Defendants to establish by testimony that prior to 1942 Plaintiff cared for the insane as a gratuity given without intent of recoupment, the proceedings relating thereto being as follows:

'Mr. Clasby: In addition to the answer "no" to the question that has been asked, we offer to prove by this witness, if he were permitted to answer, that it was the general understanding

among the bench and the bar of Alaska, from the year 1900 to 1942, insofar as this witness is acquainted with it, that the payments made by the government for the care and maintenance of insane persons were made as a gratuity and without any policy or expectation of recovery or recouping those expenses.

Mr. Arend: We object to the question as incompetent, irrelevant, and immaterial and not binding upon the government.

The Court: Objection sustained.' "

We will consider these assignment of errors together.

The First Affirmative Defense of the amended Answer (R. 22) alleges in substance, (a) that the monies appropriated annually for the care and maintenance of the insane who were committed to Morningside, were made "as a gratuity and charity" and without any thought or expectation upon the part of Congress or plaintiff that any part thereof was to be repaid by the insane persons; (b) that ever since the Act of May 17, 1884, up until the Act of Congress, October 14, 1942, plaintiff never requested or made any demand upon any insane person or legal representative for reimbursement for any monies that may have been paid for his care or maintenance; (c) that by its acquiescence from the years 1884 to 1942 in said policy that plaintiff should not be permitted to assert that monies expended by it as a gratuity and charity should now be recovered from the insane person or his legal representative.

The evidence sought to be introduced and the offers of evidence made to prove the allegations of the affirmative defense would undoubtedly, if proven, defeat plaintiff's cause of action. The sustaining of the demurrer and the rejection of the evidence offered constitute therefore error of a very substantial nature.

GRATUITY AND CHARITY.

In order to show that the appropriations made by Congress for the care and custody of the insane were of a benevolent and charitable nature we must consider the following factors: (a) the language of the Acts of Congress themselves; (b) the contemporaneous and subsequent Congressional legislative construction thereof; (c) the executive construction of the Acts of Congress by the Secretary of the Interior and other agencies of government charged with their execution and enforcement.

The factors (a) and (b) present questions of law only. The factor (c) however, requires the evidence that we sought to introduce at the trial. However, the demurrer admits the facts alleged for the purposes of this appeal, and in this light we will consider them.

THE LANGUAGE OF THE ACTS OF CONGRESS AS SHOWING A GRATUITY.

We have, heretofore, pointed out that Congress, in the Act of June 6, 1900 (Carter's Code, p. 432), provided, that,

“* * * ; the cost of advertising for bids, executing the contract and caring for the insane, to be paid, until otherwise provided by law, out of any money in the Treasury not otherwise appropriated, on accounts and vouchers duly approved by the Governor and the Secretary of the Interior.”

This language is plain and says that the cost of caring for the insane shall be paid out of public monies, not by the insane person or out of his estate but out of money in the Treasury not otherwise appropriated.

By the Act of April 28, 1904, as amended (48 U.S. C.A. 46) Congress transferred from the Governor of Alaska to the Secretary of the Interior the duty of advertising for bids, entering into contracts, etc., for the care and custody of the legally adjudged insane of Alaska. This Act provided,

“that the cost of advertising the bids, executing the contract, and caring for the insane to be paid from appropriations to be made for such service from estimates to be submitted by Congress annually.” (48 U.S.C.A., Sec. 46.)

CONGRESSIONAL CONSTRUCTION.

Congress, pursuant to the above Act, on June 12, 1906 (34 Stat. 254), in an Act entitled “An Act making Appropriations for sundry Civil Expenses of the Government for the fiscal year ending June 30, 1907, and for other Purposes,” provided funds: “For the care and custody of persons legally adjudged insane

in the District of Alaska, including transportation and other expenses.”

This appropriation was made in aid of and for the purpose of carrying out the Act of April 28, 1904, *supra*; and it declares that the appropriations “for the care and custody of persons legally adjudged insane in Alaska, including transportation and other expenses, is a ‘*civil expense of government*’.” This is tantamount to a Congressional construction of the Act of April 28, 1904, so as to make said Act read that the cost of advertising for bids, executing the contract and caring for the insane is to be paid as a *public expense* from appropriations to be made for such service by Congress.

Congress has annually, since 1906, enacted appropriation bills of like purport and effect. By declaring that the appropriations for the caring of the insane of Alaska is (a) “civil expense of government”, it is manifest that the appropriations annually made is for a beneficent and charitable purpose. If it were otherwise and Congress intended that during the period from 1900 to 1942, that each patient committed to Morningside should pay for the reasonable cost of his care and custody, irrespective of his ability to pay, why did not Congress say so? And why, also, have the administrative officers been so negligent and lax in the performance of their duty to collect the same?

The intent of Congress is again made clear by Congressional construction in the Act of August 24, 1912 (37 Stat. 512), creating a Legislative Assembly

for Alaska in which it was provided that the authority granted the legislature

“to alter, amend, or repeal laws in force in Alaska shall not be extended * * * to the Act entitled ‘An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes’”. C.L.A. 1933, p. 166, Sec. 464.

The use of the words “care and support” are significant. It shows that Congress by its annual appropriations had supported, and intended to continue to support, the legally adjudged insane of Alaska, *and they wanted no interference by the legislature of Alaska on this score.*

The word “support” has been defined by Webster as follows: (5) “To furnish with funds or means for maintenance; to maintain; to provide for, as to support a family”, Web. New Inter. Dict.

It is impossible for us to believe that the Congress of the most humane government on earth would impose a charge upon the insane and their estate without taking into consideration their ability to pay. The rule that the government is seeking to enforce in this case, is so draconian that, if enforced, after a lapse of some forty years, will be so oppressive and burdensome that many of the estates of the insane, against whom similar actions to this are now pending and may hereafter be brought, would become bankrupt and their families reduced to destitution. The

Act of October 24, 1942, is in striking contrast to the rule that the government is seeking to enforce here. Under this humane Act the charge or contribution that may be imposed on the insane, his estate or relatives, *is limited to their ability to pay as determined by the Secretary of the Interior*. Under the Common Law *the King of England was limited to the profits of his ward's estate without waste or destruction*. The rule the government is invoking here is so inflexible and rigid that if enforced it must take its "pound of flesh" no matter how destructive the consequences may be.

If the rule invoked by the government is the Common Law we submit that it has no place in the laws of Alaska as it is not in accord with the policy of Congress as declared in the Act of October 14, 1942, nor is it applicable to the habits and conditions of our society or in harmony with the genius, spirit and *humanity* of our institutions.

SILENCE AND NON-ACTION.

As heretofore pointed out Congress has legislated fully as to the insane of Alaska and has covered the entire subject matter and has never required any payment from insane patients until October 14, 1942. It must therefore be presumed that it was the intent and policy of Congress that the insane of Alaska should not be charged for their care, treatment and support. *Its silence on this subject is significant*. The Supreme Court of the United States, in *Transporta-*

tion Co. v. Parkersburg et al., 107 U.S. 691, 702 (27 L. Ed. 584, 588), said:

“In such cases, the non action or silence of Congress, will be deemed to be an action of its will, that *no exaction* or restraint shall be imposed”.

We submit therefore, that it must be presumed that up and until October 12, 1942, that Congress in providing a hospital for the care and support of persons legally adjudged insane in Alaska, acting in its capacity as *parens patriae*, was actuated by motives of charity and benevolence. That no pecuniary obligation was intended or created against the patients who had been involuntarily compelled to accept the benefits. The government having dispensed charity cannot now recover the cost incurred upon an implied obligation to pay or in the absence of an express contract.

EXECUTIVE CONSTRUCTION.

Furthermore, the fact that the officers of the government and particularly the Secretary of the Interior neglected for some forty-two years to make any effort to collect from insane patients or their estates the cost of their care and support, furnishes the most persuasive evidence that the patient was not liable and that no implication for a promise to pay arises and that the money so expended cannot be recovered.

That the Secretary of the Interior and the agencies of the government charged with the administra-

tion of the law, believed that there was, up until October 14, 1942, no Common Law in Alaska authorizing a recovery, is manifest by their inaction over a period of some forty-two years.

Again the contract entered into between the Sanitarium Company and the United States provided that the Company should furnish the patient with clothing, food, medical supply, dental work, recreational facilities, in short, everything needed by him. (R. 37.) The witness, Haskins, was asked:

“Q. Did the Sanitarium corporation try and keep any separate account on individual patients or would they just bulk all of them?

A. They just bulk them. You get one patient who might need a lot of hospitalization and need infirmary nursing all of the time; another patient might need little. You got to bulk them that way.” (R. 57.)

If the Congress and the executive departments of our government in good faith believed that the insane were liable for the reasonable cost of their keep, why did they not so declare and insert in the contract a clause requiring that a separate account be kept for each patient?

CONTEMPORANEOUS CONSTRUCTION.

Contemporaneous construction placed upon a statute by the officers or departments charged with the duty of executing it is entitled, under the circumstances of this case and in view of the long period of time involved, to great weight. “Contemporaneous

construction'' within the meaning of the rule, is the construction which executive departments or officers charged with the enforcement of the statute, give to it, at or near the time of its enactment.

59 C.J. 1028, Sec. 609.

In some cases the Courts have treated contemporaneous and long followed construction of a statute by executive officers or departments as controlling, or as having the effect of a positive law.

59 C.J. 1029.

In *Schell's Executors v. Fauche*, 138 U.S. 562, 572, it is said:

"In all cases of ambiguity the contemporaneous construction not only of the Courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is controlling". (Citing cases.)

Particularly the Courts are reluctant to overthrow a long-followed executive construction of a statute where to do so would work injustice and be inequitable.

59 C.J. 1029, Sec. 609.

As was said in the *Town of Amherst v. Erie County*, 238 N.Y.S. 76, 79:

"In case of doubt or ambiguity, in the law it is a well known rule that the practical construction that has been given to a law be those charged with the duty of enforcing it, as well as those for whose benefit it was passed, *takes on almost the force of judicial interpretation.*" *McCarthy v. Woolston*, 210 App. Div. 152, 205 N.Y.S. 507;

Bullock v. Cooley, 225 N.Y. 566, 122, N.E. 630; *Grummer v. Tenement House etc.*, 205 N.Y. 549, 98 N.E. 332; *Easton v. Pickersgill*, 55 N.Y. 310; *People v. Charbineau*, 115 N.Y. 433, 22 N.Y. 271; *In re Washington St. A. & P. R. Co.*, 115 N.Y. 442, 22 N.E. 356.

“The rule is invoked, not on the theory that common usage can overcome the plainly expressed intention of the legislature, but on the theory that the legislature is deemed to be aware of notorious customs, and that its failure to interfere with them indicates legislative approval and acquiescence.”

Again we repeat that it is very clear that the Acts of Congress relating to the insane in Alaska plainly shows that the monies appropriated by Congress in performance of a governmental function were intended as a gratuity and charity with no thought that the insane person that would be benefited thereby should be compelled to reimburse the government for what it had expended on him.

There is no doubt that the Secretary of the Interior and other government agencies charged with the duty of executing the law, were, up until October 14, 1942, of the same opinion. This is evident from the fact that the first demand, made on August 12, 1944, by the Secretary of the Interior upon George Gartner, was for the sum of \$9,180.00, and *was based on the Act of October 14, 1942*. It was the Government's contention that that Act was retroactive (Appendix, p. 1); and it was not until this action that the Government advanced the theory of a Com-

mon Law liability. The Common Law is founded on use and if use is the foundation of the Common Law, it is fair to infer its repeal by long and continued disuse.

12 C.J. 202, Sec. 35.

In *Neal v. Farmer*, 9 Ga. 555, 565, the Court said:

“Where the subjects or persons upon which a rule of the Common Law operates, have long ceased—where the records of the Courts for many years exhibit no action under it, *it may be, and it would seem ought to be*, held as obsolete, and disregarded by Judges. It is a familiar principle that the reason of the law ceasing, the law itself ceases”.

See also 12 C.J. 178, Sec. 5.

RIGHT OF PUBLIC AUTHORITIES TO REIMBURSEMENT AT COMMON LAW.

It is a matter of grave doubt as to whether the public authorities are entitled to recover from insane persons or their estates, the reasonable cost of their care and support at Common Law.

This doubt, in view of the rule, that

“In case of doubt * * * the practical construction that has been given to a law by those charged with the duty of enforcing it, as well as those for whose benefit it was passed, takes on almost the force of judicial interpretation”, *Amherst v. Erie County*, *supra*.

should be resolved against the government.

WEIGHT OF AUTHORITIES AGAINST RECOVERY.

In 32 C.J. 687, Sec. 374, it is said:

“While there is some dicta to the effect that, under the Common Law, the estate of a lunatic was liable for his maintenance at public expense * * * it is generally held that at Common Law and in the absence of express contract or deception as to the ability to support himself, *the public authorities may not recover from the lunatic or his estate the expenses incurred on his account, * * **”.

In 44 C.J.S. 175, Sec. 75, the word “dicta” in the above quotation has been changed to “authority”, otherwise the text remains the same.

In *Brown’s Committee v. Western State Hospital*, 110 Va. 321, 66 S.E. 48 (1909), it is said:

“It seems not to be controverted that no such right existed at Common Law, in the absence of an express contract, but that the right of action against the estate of a lunatic for past expenses incurred in supporting him in one of the state hospitals can only exist by statute imposing a personal liability for such support.”

In *State v. Colligan*, 128 Iowa 536, 104 N.W. 905, it is said:

“The contention upon behalf of the State is that the estate of an insane person is liable for the necessary expenses of his support. Conceding this legal proposition we find no authority for holding that the State, having established hospitals for the insane, which are largely charities, and provided, in the interest of humanity and for

the protection of society, that insane persons shall be confined therein, *has any Common Law right of recovery against those who have received the benefits of such public charities.* The uniform rule seems to be that there is no liability upon the part of the person who receives such benefits, or on the part of his relatives, *to make compensation save as such compensation may be expressly required and provided for by statute. No such obligation is implied.* Delaware Co. v. McDonald, 46 Iowa 170; Montgomery Co. v. Gupton, 139 Mo. 303, 39 S.W. 47, 40 S.W. 1094”.

See also *Baker v. District of Columbia*, 39 App. 42.

In *Wiseman v. State* (Tex. Civ. App. 1936), 94 S.W. (2d) 265, 266, it is said:

“This Court has reached the conclusion that the right of the State to reimbursement for care and maintenance of demented persons did not exist at Common Law, and that State’s right and remedy therefor existed and has ever existed by reason only of the Statutes enacted for that purpose. 32 C.J. 686, Sec. 373, 374; 14 R.C.L. 566, Sec. 18”.

In *Baldwin v. Douglas*, 37 Neb. 283, 55 N.W. 875, the Court said:

(877) “As is said in *Delaware County v. McDonald*, 46 Iowa 171: ‘The State reaches out its strong arm, and makes the insane its wards, regardless of the care which they may receive at home or the wishes of those upon whom they are dependent for their support * * *. The State

asserts its right for the reason an insane person may often need more than mere maintenance. He often needs restraint, confinement, medical attendance, and peculiar care and treatment. Society is entitled to be protected and relieved against him, and when this is so the State very properly takes charge of him and makes him its ward. *We know of no principle of equity or justice that under these circumstances would imply a contract by the husband to answer for the treatment of his wife furnished by the State in the interests of the general public''.*

The support of the insane of Alaska is made a charge on the public and they are by law given a right to their maintenance. Relief to them is nowhere styled a loan or advance nor has repayment ever been contemplated by any law.

Goodale v. Laurence, 88 N.Y. 513;

Alna v. Plumer, 4 Me. 258;

Templeton v. Stratton, 128 Mass. 137;

Alger v. Miller, 5 Barb. 227;

Poplin v. Hawks, 8 N.H. 305.

The law raises no implied obligation on the part of one received into a charitable institution for support or treatment to pay therefor in the absence of a contract. Such relief is referred to motives of charity unless the laws otherwise provide that compensation may and shall be demanded.

Commissioners of Montgomery County v.

Ristine, 124 Ind. 242, 24 N.E. 990;

Deer Isle v. Eaton, 12 Mass. 328;

Medford v. Learned, 12 Mass. 215.

ERRORS COMMITTED AT THE TRIAL.

ASSIGNMENT OF ERRORS.

“Assignment V. (R. 98.) The Court erred in permitting John LeRoy Haskins, a witness called on behalf of Plaintiff, to testify over the objection of Defendants, as follows:

Q. Are you acquainted with George Gartner?

A. Yes.

Q. How long have you known him?

A. I have known George since July, 1936.

Q. Now, Dr. Haskins, I would like to have you state to the jury what, in your opinion, was the reasonable value of the care and maintenance provided Mr. George Gartner at Morningside Hospital, on a monthly basis, per month during 1927?

Mr. Clasby: To which we object, if the Court please, for several reasons. The first, this witness was not present at the hospital in 1927 and has no personal knowledge of the services that were then performed for George Gartner. This witness was not then a member of the staff of the Sanitarium Company and has no knowledge of what it cost the Sanitarium Company to supply those services or what the reasonable value of those services were. This witness has further testified that at that time he was in New York—or, no—he was in the general practice of medicine. He was not even connected with psychiatry or had any knowledge of hospitals for insane patients.

The Court: Objection overruled.

A. About \$52.00 a month.

Assignment VI. (R. 99.) The Court erred in permitting John LeRoy Haskins, a witness called

on behalf of Plaintiff, to testify over the objection of Defendants, as follows:

Q. Will you give us your answer to the same question for the year 1928?

Mr. Clasby: Just a moment. To which we interpose the same objection, if the Court please. The witness' testimony shows in 1928 he was in private practice; he had no familiarity with this institution or this patient or costs at psychiatric institutions. It hasn't been shown that he has any records or information available to him from which to form an opinion as to the cost in 1928, the same as our objection to the year 1927. There is other and better evidence that can be produced to establish that cost, and that is the record of the sanitarium itself.

The Court: Objection overruled.

A. \$52.00 a month.

Assignment VII. (R. 100.) The Court erred in permitting John LeRoy Haskins, a witness called on behalf of Plaintiff, to testify over the objections of Defendants as follows:

Q. And will you answer the question with reference to the year 1929?

A. \$52.00 a month.

Mr. Clasby: We, if the Court please, would like to have the record show an objection to all questions of this kind up to the year 1936.

The Court: Very well, the same ruling to the objections.

Q. For 1930?

A. 1930. At that time food prices were somewhat lower.

Mr. Clasby: We object to comments by the witness.

Mr. Arend: Yes. You can just state—

A. (Interposing) \$47.00.

Q. 1931? A. \$47.00.

Q. 1934? A. \$47.00.

Q. 1932? A. \$47.00.

Q. 1935? A. \$47.00

Q. 1933? A. \$47.00.

Q. 1936? A. \$50.00.

Assignment VIII. (R. 101, 102.) The Court erred in refusing to strike the testimony of Plaintiff's witness John LeRoy Haskins as to the reasonable value of Plaintiff's services to the Defendant George Gartner for the reason that said testimony was based entirely upon the contract price between the Plaintiff and the Sanitarium Company, the proceeding in relation thereto being as follows:

Q. On what do you base that?

A. Well, I base it on reports which we have from the United States Public Health Service and the physician, who was on duty at the institution at that time.

Q. What did he base it on?

A. He based it on what he believed to be adequate care of the patient. They were getting adequate care, and an investigation had shown that that was about equivalent with the care in other hospitals of the same type.

Q. You, at that time, had no knowledge of the care that was given to George Gartner?

A. I am going on his notes, his clinic records, and his observations which are in the hospital now, and his reports to the department covering those periods.

Q. Well, aren't you largely going on the contract price?

A. If the contract price was a fair—If the contract price was a fair price, and it was, that was the adequate care.

Q. If I recall your testimony properly, Doctor, your testimony coincides exactly with the contract price?

A. Well—

Q. Isn't that correct?

A. Yes, we believe that—

Q. (Interposing): Now, wait a minute, And that your testimony as to when the reasonable value of the services rendered George Gartner varied, why the contract varied too?

A. Yes.

Q. *Now I ask you, isn't your testimony based entirely upon the contract price?*

A. *What else would it be based on?*

Mr. Clasby: Well, on that basis, if the Court please, we move that this testimony be stricken for the reason that he has admitted it is based on the contract price.

Assignment IX. (R. 102.) The Court erred in admitting, over objection by the Defendants, the contract price for per capita care of patients at Morningside Hospital during the years 1927 to 1942; agreed upon between the Plaintiff and the Sanatorium Company, the proceedings relating thereto being as follows:

Mr. Arend: If the Court please, at this time we ask permission to read the stipulation to the jury.

The Court: Very well.

Mr. Clasby: We object to the stipulation being admitted in evidence upon the grounds and for the reason that the contract price as therein stipulated is not proper evidence to be submitted in a proceeding of this kind and has no tendency to prove any of the issues.

The Court: Objection overruled."

This stipulation (Pl. Ex. A, R. 72-74), entered into between the attorneys is in substance that the contract prices agreed to between the United States and the Sanitarium Company for the care, custody, medical treatment and maintenance of the insane patients at Morningside during various five-year periods, were as follows:

January 1925, five years @ \$52.00 per month, per patient;

January 1930, five years @ \$47.00 per month, per patient;

January 1935, one year @ \$47.00 per month, per patient;

January 1936, one year @ \$50.00 per month, per patient;

January 1938, five years @ \$54.00 per month, per patient.

The trial of this case discloses a flagrant violation of the legal and constitutional rights of the defendants. The trial was had before the Court and a jury. The issue involved was "the reasonable cost of the care and maintenance of the defendant, George Gartner", at Morningside Hospital from August 10, 1927, to October 13, 1942 (Complaint, R. 3, 4), a period of more than sixteen years, during all of which time no claim or demand was made on behalf of the United States, or any agency thereof, that Gartner was indebted to the United States in any sum whatsoever for his care and keep at Morningside.

The judgment is for the sum of \$9,180.11, with interest at the rate of 6% per annum, together with costs in the sum of \$83.00. (R. 29.) The judgment was rendered upon a verdict directed by the District Judge upon his own suggestion. (R. 86, 87.) The verdict has not a scintilla of evidence to support it. It is based entirely on the *opinion* of Dr. John LeRoy Haskins, a psychiatrist, to the effect that the per month per capita contract price agreed to by the United States and the Sanitarium Company for the care and maintenance furnished Gartner at Morning-side during the period involved was the reasonable value thereof.

The witness testified that the Sanitarium Corporation did not keep separate accounts for individual patients, and that "they just bulk all of them". (R. 57.) Also that different patients need different treatment, his testimony in this respect being, "You get one patient who might need a lot of hospitalization, and need infirmary nursing all of the time; another might need little. You got to bulk them". (R. 57.) Gartner was one of the patients that "need little".

Gartner's clinical record shows "that his is a case of dementia præcox and that while he is a good contact, knows people, knows where he is, his age, and all those details, he is a delusional patient. (R. 51.) That the clinic record shows that about five years ago he developed a cardiac condition. (R. 52.) (This is subsequent to the period here involved. (That prior to that time the clinic record shows no physical ailment—nothing striking in his physical case. (R. 52.)

That he could do *duties* around the garden, barns, etc. The record shows that at one time he helped in the kitchen and dining room. That only 15 to 20% of the average 365 patients at the hospital were permitted to perform functions in the dining room, garden, or in the hospital industry. (R. 54, 55.) Gartner was one of the 15 to 20%.

NECESSARIES AND SERVICES FURNISHED GARTNER.

The evidence shows that under the contracts with the government the Sanitarium Company was to provide everything for the patients. Food, wearing apparel, medical supplies, dental work, recreational facilities, and sleeping quarters.

The normal and usual way to prove the reasonable value of the necessities furnished and services rendered is to show, (1) what the items of the necessities furnished and services rendered were; (2) their kind, quantity, and quality; (3) the reasonable cost of each item. Competent evidence of these facts would enable the jury to render a just and fair verdict. No such evidence was offered in this case. Not a word of testimony was given as to any item of necessities furnished, or of services rendered, and this being so, no evidence could or was given as to the kind, quantity, or quality of the items furnished or their reasonable value.

Instead the government sought to prove the reasonable value by introducing, over the objections of

defendants, the contract price per patient per month entered into between the Company and the government. This testimony being admitted, the witness testified that the contract prices were the reasonable value for the care and treatment furnished Gartner while committed at Morningside.

The culmination of the witness's testimony is summed up in the following question and answer:

“Q. Now I ask, isn't your testimony based entirely on the contract price?

A. What else would it be based on?”

We submit that the opinion of John LeRoy Haskins was immaterial and incompetent. It was immaterial because *this is not a case calling for expert or opinion testimony*. It was for the jury, upon competent and material evidence being introduced, to determine the issue of its reasonable value. The opinion of the witness invaded the province of the jury. *It was an error to admit it in evidence.*

THE COURT ERRED IN DENYING APPELLANTS' OFFER TO SHOW THAT THERE WERE NO PROFITS IN THE GARTNER CASE.

ASSIGNMENT OF ERROR.

“Assignment XII. (R. 108.) The Court erred in refusing to permit the Defendant, Mike Erceg, as guardian of the Estate of George Gartner, an insane person, to testify as to the property of said George Gartner and the lack of profits therefrom, the proceedings relating thereto being as follows:

Q. Mr. Erceg, would you tell us what property George Gartner had when you assumed control of his estate?

Mr. Arend: If the Court please, we object to this testimony as irrelevant and immaterial. Whether or not he had property is not relevant and material to the issues in this case.

The Court: Objection sustained.

Q. Does George Gartner's estate now have any assets that represents income from the property that you have administered in this estate?

A. No.

Mr. Arend: We object to that question on the same grounds as the preceding question.

The Court: Objection sustained.

Mr. Clasby: We offer to prove by this witness, if he were permitted to testify, that * * * there has been no profits over and above the necessary expenses of preserving the property of this estate during the time that it has been administered by the guardian.

Mr. Arend: We object to all of the testimony as irrelevant and immaterial under the issues of this case.

The Court: Objection sustained."

In support of this assignment of error we here adopt the argument and authorities cited by us in support of subdivision (a) Assignment of Error I, Ante page 6.

The Court erred in directing a verdict for the Government.

ASSIGNMENT OF ERROR XV. (R. 113.)

“The Court erred in directing a verdict for the Plaintiff, and in receiving and filing such verdict as being contrary to the law and the evidence, the proceedings relating thereto being as follows:

The Court: Well, you are not making a motion for a directed verdict?

Mr. Arend: Well, your Honor, we move the Court for a directed verdict in this case, directing the jury to bring in a verdict in line with the values established by the government’s witness, Dr. Haskins * * *.

Mr. Clasby: May it please the Court, * * * We have offered what we think is a question for the jury, and that is that this man was not a patient that required a great deal of care and attention and that he could perform services, and the evidence shows that the price testified to is a per capita average cost, and we believe this jury is entitled to, under the evidence and the law, have submitted to them the question of whether or not that price is what the value of these particular services rendered to George Gartner was; and on that theory we resist counsel’s motion for a directed verdict.”

As heretofore stated, the only evidence before the Court was the evidence of Dr. Haskins, the psychiatrist, that his opinion was based entirely upon the contract price. Solely upon this evidence the Court instructed a verdict for the plaintiff. This was error.

In *Doernbecher Mfg. Co. v. Commissioner of Internal Revenue*, 95 Fed. (2d) 296, this Court, in de-

termining whether salaries paid officers of the corporation exceeded the value of services rendered, held that the corporation could only deduct the amount found to be the reasonable value of the services rendered, in computing taxable income. This Court held that the opinions must be based upon evidence; and that the Tax Board was not bound by the testimony of experts, and said:

“In determining a reasonable allowance for such services, the Board of Tax Appeals may exercise its own independent judgment. Its power is similar to that of a jury required to determine such value. As early as *Head v. Hargrave*, 105 U.S. 45, 49, 26 L. Ed. 1028, the Supreme Court, speaking through Mr. Justice Field, said: ‘It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience, and knowledge of the character of such services. * * * The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts mate-

rial to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry'. This rule was followed in *Forsyth v. Doolittle*, 120 U.S. 73, 7 S. Ct. 408, 30 L. Ed. 586, and in *The Conqueror*, 166 U.S. 110, 132, 17 S. Ct. 510, 41 L. Ed. 937.

The rule has been recently stated in an opinion by Judge Sanborn, speaking for the Circuit Court of Appeals for the Eight Circuit in *U.S. v. Washington Dehydrated Food Co.*, 89 F. (2d) 606, 609; by this court, speaking through Judge Haney, in *Buck v. Com'r*, 83 F. (2d) 786; and by Justice Cardozo, speaking for the Supreme Court, in *Dayton Power & Lt. Co. v. Public Utilities Com'r*, 292 U.S. 290, 299, 54 S. Ct. 647, 652, 78 L. Ed. 1267, where he said: 'But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury (citing cases) or to a judge (citing cases), or to a statutory board (citing cases).' "

The rule has been stated "that if the Court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony". *Spring Co. v. Edgar*, 99 U.S. 658, 22 C. J. 728, Sec. 823.

Wherefore Appellants pray that the Judgment of the District Court be reversed.

Dated, Fairbanks, Alaska,
August 15, 1947.

Respectfully submitted,
JOHN L. MCGINN,
COLLINS & CLASBY,
By CHAS. J. CLASBY,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.



Appendix

1-480

Defdt. Identification

A

..... Exhibit

U. S. A.

Plaintiff,

vs.

Gartner et al.,

Defendant.

No. 5368.

United States of America

* * *

Department of the Interior,

Washington, D. C.

August 31, 1944.

Pursuant to Title 28, Paragraph 661, United States Code, I hereby certify that the annexed photostat is a true copy of the original Administrative Finding and Order of the Secretary of the Interior dated August 12, 1944, regarding payment for the care and treatment of George Gartner at Morningside Hospital, Portland, Oregon, as such document appears in the records and files of this Department.

(SEAL) In TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

(s) ABE FORTAS,

Under Secretary of the Interior.

United States
Department of the Interior
Office of the Secretary
Washington

George Gartner,
an insane resident
of Alaska.

Finding as to ability to
pay for care and treatment
at Morningside Hospital.

ADMINISTRATIVE FINDING

AND ORDER

* * *

WHEREAS, By virtue of the act of Congress entitled "An Act to amend the law relating to the care and custody of insane residents of Alaska, and for other purposes," approved October 14, 1942 (56 Stat. 782), the duty is imposed upon a resident of Alaska who has been legally adjudged insane and committed to a mental institution, or his legal representative, spouse, parents or adult children, to pay or contribute to the payment of the charges for the care and treatment of such patient in such manner and proportion as the Secretary of the Interior may find to be within their ability to pay; and

WHEREAS, George Gartner, a resident of Alaska, was on or about August 1, 1927, duly adjudged insane and committed to Morningside Hospital of Portland, Oregon, a mental institution under contract with the Department of the Interior for the care, treatment and custody of the Alaska insane, where he has been

confined from August 10, 1927, continuously to the present time; and

WHEREAS, the actual cost of the care and treatment of the said George Gartner from August 10, 1927 to July 1, 1944, was the sum of \$10,502.70, and that pursuant to Article 10 of the agreement dated November 10, 1942, between the Department of the Interior and the Morningside Hospital, the cost subject to modification as reflected by the United States Department of Labor cost-of-living index, will continue to be at the rate of \$70 per month; and

WHEREAS, It appears that Mike Erceg of Fairbanks, Alaska, was, by order of the United States Commissioner, Fairbanks Precinct, dated on or about August 1, 1927, duly appointed guardian of the estate of said George Gartner and is still acting as such guardian and that the assets of the said estate amount to \$9,986.10 and a patented mining claim.

Now, THEREFORE, I do hereby find and determine as follows:

1. That the sum of \$10,502.70, representing the cost of the care and treatment of said George Gartner at Morningside Hospital from August 10, 1927, to July 1, 1944, said George Gartner or Mike Erceg of Fairbanks, Alaska, as his guardian, is able to pay the sum of \$9,000;

2. That for the future care and treatment of the said George Gartner at Morningside Hospital, said George Gartner or Mike Erceg of Fairbanks, Alaska, as his guardian is able to and shall pay the sum of \$50 per month;

3. That neither this order nor payments made in compliance therewith shall constitute either determination of the amount or payment in full of the claim of the United States for reimbursement for the cost of the care and maintenance of said George Gartner at Morningside Hospital and the right of the Secretary of the Interior to modify, amend or revoke this order is hereby reserved.

(s) HAROLD L. ICKES,
Secretary of the Interior.

August 12, 1944.

Certified Copy.

Fourth Division District of Alaska }
 United States of America } ss:

I, John B. Hall, Clerk of the United States District Court in and for the Fourth Division District of Alaska, do hereby certify that the annexed and foregoing is a true and full copy of the photostat entered in Cause No. 5368, entitled United States of America, Plaintiff, versus George Gartner, et al, Defendants, as Defendant's Identification "A", now remaining among the records of the said Court in my office.

In TESTIMONY WHEREOF, I have hereunto
 subscribed my name and affixed the seal
 (SEAL) of the aforesaid Court at Fairbanks,
 Alaska, this 31st day of July, A.D., 1947.

John B. Hall,
Clerk.

By Olga T. Steger,
Deputy Clerk.

No. 11623

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

GEORGE GARTNER, AN INSANE PERSON, AND MIKE
ERCEG, GUARDIAN OF THE ESTATE OF GEORGE GART-
NER, AN INSANE PERSON, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE TERRITORY OF ALASKA, FOURTH DIVI-
SION

BRIEF FOR THE UNITED STATES

HARRY O. AREND,
*United States Attorney,
Fourth Division, District of Alaska.*

FILED

SEP 30 1907

WILLIAM H. O'BRIEN,
CLERK

SUBJECT INDEX

	Page
Statement.....	1
Questions presented.....	2
Argument.....	4
I. At common law the sovereign was entitled to reimbursement from the estate for public money spent in the care of an insane person.....	4
II. The United States may maintain this action for reimbursement under the commonlaw rule made applicable to Alaska by Congress.....	15
Silence and nonaction do not militate against the Government.....	21
Federal funds appropriated for the care of non-indigent Alaskan insane not intended to be a gratuity or charity.....	23
III. Profits from the estate, or lack thereof, not essential to this case.....	24
IV. Witness Haskins was qualified to give his opinion regarding reasonable value of care and treatment.....	26
V. The contract price between the Government and the Hospital Corporation was properly admitted in evidence.....	30
VI. The Court did not err in directing a verdict on the uncontradicted evidence of Dr. Haskins.....	31
Conclusion.....	33

TABLE OF AUTHORITIES CITED

Cases:	
<i>Baldwin v. Douglas</i> , 55 N. W. 875 (Nebr.).....	13
<i>Barris County v. Glass</i> , 160 S. W. 2d 808 (Mo.).....	26
<i>Binns v. U. S.</i> , 194 U. S. 486, 491.....	16
<i>Board of Chosen Freeholders v. Ritson</i> , 54 Atl. 839 (N. J.).....	6
<i>Brown's Committee v. Western State Hospital</i> , 66 S. E. 48 (Pa.) ..	13
<i>Bryan v. Landis</i> , 142 So. 650, 106 Fla. 19.....	17
<i>Central Vermont Ry. Co. v. Bowers, et al.</i> , 134 Atl. 608 (Vt.).....	33
<i>City of Corpus Christi v. Coffin</i> , 35 S. W. 2d 202 (Texas).....	17
<i>Commissioners, etc., v. Ristine</i> , 24 N. E. 990 (Ind.).....	13
<i>Commonwealth v. Frey's Estate</i> , 55 York 205.....	6
<i>Commonwealth v. Mason</i> , 15 S. E. 2d 114 (Va.).....	17
<i>Cowdery v. McChesney</i> , 58 P. 62 (Calif.).....	28
<i>Coxson v. Atlanta Life Ins. Co.</i> 179 S. W. 2d 943 (Texas).....	33
<i>Dandurand v. Kankakee County</i> , 63 N. E. 1011 (Ill.).....	9, 22
<i>Dayton Power & Lt. Co. v. Public Utilities Com'r</i> , 292 U. S. 290, 299, 54 S. Ct. 647, 652.....	32
<i>E. B. & A. C. Whiting Co. v. City of Burlington</i> , 175 Atl. 35 (Vt.)..	17
<i>Ex parte Morgan</i> 20 F. 298, 305.....	15

Cases—Continued.

	Page
<i>Garwols v. Bankers' Trust Co.</i> , 232 N. W. 239 (Mich.)	19
<i>In re Arnold's Estate</i> , 98 Atl. 701 (Pa.)	6
<i>In re Erny's Estate</i> , 12 Atl. 2d 333, 337 Pa. 542	13
<i>In re Fassetta's Estate</i> , 57 P. 2d 1336 (Calif.)	22
<i>In re Frey's Estate</i> , 21 Atl. 2d 23 (Pa.)	31
<i>In re Hahto's Estate</i> , 294 N. W. 500 (Wis.)	12
<i>In re Phelan's Estate</i> , 222 N. W. 218 (Wis.)	17
<i>In re Yturburru's Estate</i> , 66 P. 729 (Calif.)	24
<i>Inyo County v. Hess</i> , 200 P. 373, 53 Calif. App. 415	20
<i>Lopey v. State</i> , 291 S. W. 966 (Texas)	10
<i>Lutz v. State</i> , 172 Atl. 354, 167 Md. 12	17
<i>McNairy v. McCoin et al.</i> , 45 S. W. 1070, 1071 (Tenn.)	7
<i>Miller v. Puget Sound Bridge & Dredging Co.</i> , 250 P. 64 (Wash.)	28
<i>Oklahoma K. & M. I. Ry. Co. v. Bowling</i> , 249 F. 592	16
<i>Palmer et al. v. Hudson River State Hospital</i> , 61 P. 506 (Kan.)	10
<i>People ex rel Nelson v. West, etc., Bank</i> , 187 N. E. 525 (Ill.)	17
<i>Peters v. Sacramento City Employees Retirement System</i> , 80 P. 2d 179 (Cal.)	33
<i>Porter Construction Co. v. Berry</i> , 298 P. 179 (Or.)	28
<i>Prendergast v. Retirement Board</i> , 60 N. E. 2d 768 (Ill.)	33
<i>Silver Falls Lumber Co. v. Eastern and Western Lumber Co.</i> , 40 P. 2d 703, 149 Or. 126	17
<i>State v. Colligan</i> , 104 N. W. 905 (Iowa)	13
<i>State v. County Court</i> , 101 P. 905, 54 Or. 255	20
<i>State Commission in Lunacy v. Eldridge</i> , 94 P. 597, 599, 600 (Cal.)	9
<i>State v. Ikey's Estate</i> , 79 Atl. 850, 84 Ver. 336	4
<i>Talbott v. Silver Bow County</i> , 139 U. S. 439, 446	16
<i>U. S. v. Bank of North Carolina</i> , 31 U. S. 19, 6 Pet. 29	15
<i>U. S. v. Swierzbenski, et al.</i> , 18 F. 2d 685	15
<i>Wiseman v. State</i> 94 S. W. 2d 265 (Texas)	11, 13
<i>In re Hofmann's Estate</i> 26 N. Y. S. 2d 430, 432	12

STATUTES

Compiled Laws of Alaska, 1933, Sec. 4527	23
Compiled Laws of Alaska, 1933, Sec. 4528	23
31 Stat. 321, 552 (Act of June 6, 1900)	15
56 Stat. 782 (Act of Oct. 14, 1942)	20

TEXTS

22 C. J. p. 593	28
32 C. J. 686, Sec. 373, 374	13
59 C. J. 905, Sec. 510	20
15 C. J. S. 630, Sec. 16	15
15 C. J. S. 631, Sec. 17	15
32 C. J. S. 419, Sec. 572	33
32 C. J. S. p. 1139, Sec. 1049, e.	31

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11623

GEORGE GARTNER, AN INSANE PERSON, AND MIKE
ERCEG, GUARDIAN OF THE ESTATE OF GEORGE GART-
NER, AN INSANE PERSON, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE TERRITORY OF ALASKA, FOURTH DIVI-
SION*

BRIEF FOR APPELLEE

STATEMENT

The first five pages of the brief of the appellants (defendants below) appear intended for a statement of the case. We shall regard them as such and hereby admit that they fairly present the pleadings, facts, and circumstances which gave rise to the questions presented in this appeal, with one exception. The statement on page five of the brief does not do justice to witness John Leroy Haskins' extensive knowledge of the cost incurred by the Government in the care and treatment of the appellant George Gartner and

would make it appear that this witness' testimony as to the reasonable cost of such care was based entirely on the contract price between the Government and the private hospital to which Gartner had been committed as an insane person. As a matter of fact, the witness Haskins was thoroughly familiar with the case history of Gartner and the care and treatment that had been given him (R. 34-39, 41, 51-57); and the witness further testified as to the many factors that he took into consideration in arriving at his opinion as to the reasonable cost of care and treatment for Gartner (R. 35-40, 46-47, 49-51, 56-58, 64-67).

QUESTIONS PRESENTED

After a careful consideration of the specification of errors and the argument advanced in support thereof by the appellants in their brief, we conclude that the vital questions at issue in this appeal are:

1. At common law was the estate of an insane person liable to the sovereign for expenses incurred in the care and treatment of such insane person?

2. If, at common law an insane person is liable to the sovereign for the public expense of his maintenance, may that rule be invoked by the United States of America in a suit commenced in the Territory of Alaska to recover from an insane person, or his estate, money expended under appropriations by Congress for the care and custody of the insane of Alaska?

3. To obtain a judgment at common law against an insane person, or his estate, for public money spent for his care, is it necessary for the Government (plaintiff below) to first allege and prove that there were profits derived from the estate in an amount sufficient to pay for such care?

4. May an experienced doctor and psychiatrist, who is the agent of the plaintiff and also the director of the insane hospital in question, and who is well acquainted with the insane patient (one of the defendants below) and his clinical record at the hospital and has extensive knowledge of the cost of caring for the insane in public institutions generally, give his opinion as to the reasonable cost of the care and treatment of the particular patient at such insane hospital in question?

5. Was it error for the trial court in this case to permit the introduction in evidence of the contract price between the Government and the hospital for per capita care of insane persons at said hospital?

6. Was it error for the Court to direct a verdict for the government when the only evidence as to the services rendered to the insane patient and the reasonable value thereof was the uncontradicted testimony of the expert witness as detailed in question 4 above?

In our argument, which follows, we proceed to consider in regular order the questions thus presented by a preface of our conclusion in bold type.

ARGUMENT

I

At common law the sovereign was entitled to reimbursement from the estate for public money spent in the care of an insane person

Perhaps the best historical treatment of the proposition that there was a right to reimbursement at common law is to be found in *State v. Ikey's Estate*, 79 Atl. 850, a case mentioned also by the appellants (Br. 12). We quote at length from the opinion of the Supreme Court of Vermont in that case:

By the common law of England it is the duty of the King to take care of all his subjects who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves. Some distinction is there made, as to property, between an idiot or fool, natural, and a lunatic, one has had understanding, but by disease, grief, or any other cause has lost the use of his reason. With the law touching the latter class, we have to do in this case. It is said by Lord Coke that if a man who was of sound memory becomes non compos mentis, and afterwards aliens his lands, or goods or chattels, and afterwards, by office of the King's suit, it is found that he was non compos mentis, and that he has aliened, etc., the King shall protect him who cannot protect himself, and shall take the profits of his lands, and of all that he had, and therewith maintain him and his family; but the King shall not take any of the said profits to his own use, and that all this appears by the statutes *De Praerogativa Regis*, 17 Edw. II, c. 10, which was but a declaration

of the common law * * *. Lord Chancellor Loughborough said this statute was not introductive of any new right of the crown; that the object was to regulate and define the prerogative, and to restrain the abuse of treating the estates of lunatics as the estates of idiots. *Oxendon v. Lord Compton*, 2 Ves. Jr. 69, 4 Bro. C. C. 231. And with this agree all the cases says Chancellor Kent, in *Barker's Case*, 2 Johns. Ch. (N. Y.) 232 * * *.

Under our form of government the sovereign state has the same common-law duty resting upon it concerning the care and custody of persons and estates of those who have lost their intellects, and become non compos, or unable to take care of themselves (see *In re Allen*, 82 V. 365, 381, 73 Atl. 1078, 26 L. R. A. (N. S.) 232); and it is manifest from the statutory regulations in this respect that *the policy of the state is as at common law*, that the estates of such wards shall be appropriated to their proper maintenance, before they can be supported at the expense of the state * * *.

“That the Legislature has the power to make the property and estates of such wards of the state liable for their maintenance there can be no doubt. Legislation of this character is along the lines of the common law; the underlying principles are the same * * *.

Commenting upon certain statutes of New Jersey, which provided that insane persons supported in county asylums should be personally liable for their maintenance therein and all necessary expense incurred by the institution in their behalf, the Court

of the State held in *Board of Chosen Freeholders v. Ritson*, 54 Atl. 839:

Insane persons and other persons not sui juris are wards of the state, and may be sued and their estates charged in such manner as is authorized by statute. That it is within the power of the Legislature to make the estate of an insane person liable for his or her maintenance does not seem to be open to controversy. This statute in that regard is but declaring of that which was a fact at common law, and in this respect the statute simply gives the board of chosen freeholders, when they furnish the maintenance at public expense, the right to recoup for the public, the expense thus incurred.

In the Pennsylvania Orphans Court it was held that the Commonwealth, both at common law and under statutory law, has the right to recover from the estate of a lunatic the cost of maintaining the lunatic while confined in a State institution. *Commonwealth v. Frey's Estate*, 53 York 205.

It was an easy step for the Supreme Court of the State of Pennsylvania to pass from the King's obligation to care for the insane of the realm and his prerogative to be reimbursed from their estates for the cost of such case, and declare, as it did in *In re Arnold's Estate*, 98 Atl. 701, that:

Moved by the dictates of humanity, the state makes provision for the care of the indigent insane in cases where there is no one legally liable for their support, or where such person or persons by reason of poverty are unable to discharge that duty. But there is no warrant whatever for charging upon the state the bur-

den and expense of caring for those who have estates sufficient for this maintenance, * * *. The fact that the estate was for a time not sufficient, and that the state during that period undertook the support of the lunatic is no reason why it should not now be reimbursed for the outlay. *The general proposition that the law implies an obligation on the part of the lunatic or his estate to reimburse those who have supplied his necessities cannot be questioned* * * *.

Nearly fifty years ago (1898) the Supreme Court of Tennessee announced the implied-obligation rule in the case of *McNairy County v. McCoin et al.*, 45 S. W. 1070, 1071, as follows:

The duty imposed by the common law upon the guardian to maintain and support his ward is no less obligatory than that imposed upon the husband to support his wife; and, if the guardian, with means of the ward at his disposal, breaches his duty, and permits his ward to become a charge upon the county, it should be reimbursed for expenses incurred in supplying necessities to the ward. It is true the county asylum established under the laws of this state is a charitable institution. It was designed for the care and maintenance of indigent paupers, and not for the benefit of those who have means sufficient to support themselves. If, therefore, it appears that the county, through the neglect of the guardian, has been compelled to provide for one who was not a pauper, it would seem but just that the county should be indemnified out of the funds be-

longing to the ward; and to this effect is the great weight of authority. [Citing cases.]

As early as 1901, in the case of *In re Yturburru's Estate*, 66 P. 729, the Supreme Court of California laid down the rule that Civil Code § 38, making an insane person liable for necessities, and hence requiring the expense of a patient in a state hospital for the insane to be paid from his estate, if he has one, is not unconstitutional, as class legislation or double taxation. The Court reasoned as follows:

An insane person is liable for the reasonable value of things furnished to him necessary for his support. Civ. Code, § 38. *This was so at common law, where the necessities were furnished by an individual; and we have never seen a case, and do not think that any can be found, holding that this rule comes in conflict with any provision of the constitution of this or any other state of the Union. We see no reason why the same rule should not apply to a state hospital for the insane which does and furnishes for the insane person only those things required by the law of the state* * * *.

The contention of appellant based on the theory that these hospitals are charitable and eleemosynary institutions, and should not be converted into boarding houses finds a ready answer. It is as necessary to have institutions for the restraint of the insane, whether they be rich or poor, as it is to have prisons and almshouses; and these institutions for the insane are charitable only so far as the legislature makes them so. There is nothing in the constitution inhibiting laws extending charity to

people in need of it, but it is not necessary to extend charity to those who are able to support themselves * * *.

The California Court had occasion to follow its holding in the Yturburru case seven years later in *State Commission in Lunacy v. Eldridge*, 94 P. 597, 599, 600, and there, speaking of the purpose of the State in establishing insane asylums, commented:

* * * the main object of the state in the maintenance of such institutions is much the same as that of counties in the maintenance of hospitals and poorhouses to care for and minister to the necessities of the indigent sick and others unable, through old age or other physical infirmities to take care of themselves. If some one, having estate to defray the expense of his own care and support, or, having no estate, but relatives legally liable for his care and maintenance, with ability to provide it, were to go to a county hospital or a poorhouse for such care and maintenance, would it be a supportable proposition that, because he or his said relatives have borne their proportion of the general tax, such person could secure the benefit of such care and maintenance without paying something toward it? * * * We can see no distinction in principle in this regard between such county institutions and state hospitals for the insane * * *.

In the case of *Dandurand v. Kankakee County*, 63 N. E. 1011, Dandurand, an insane person, committed to the state hospital for the insane, was removed to the county hospital for further care and treatment, all with the knowledge of his guardian. Speaking of the

liability of Dandurand's estate to reimburse the county for such care and treatment, the Illinois Court said:

* * * He was in need of board, care, and medical attention, and was obviously unfit to be at large, and the county furnished him that care. His conservator knew the facts, and did not offer to provide for him elsewhere, or take any steps to have any change made. We are of the opinion defendant was impliedly liable for these necessities so furnished him * * *. Section 17, C. 86, of the Revised Statutes requires the conservator to apply the income and profit of his ward's estate, so far as may be necessary, to the comfort and suitable support of his ward * * *.

Kansas adopted the rule of implied liability in *Palmer et al. v. Hudson River State Hospital*, 61 P. 506. In 1927 the Texas Court of Civil Appeals, though an existing statute provided that the state should be reimbursed by the estate of an insane person for keeping such patient in a state hospital, digressed to recognize the prevailing division of authority as to whether such right to reimbursement existed at common law. Said the Court in *Lopey v. State*, 291 S. W. 966:

The decisions applying the rule of common law to suits of this character are not uniform. In some jurisdictions it has been held that the state, having established hospitals for the insane, which are largely charities, and having provided, for the protection of society, that insane persons shall be confined therein, has no common-law right of recovery against one who receives the benefit of such public charities, and

his estate cannot be burdened with such liability. In other jurisdictions it is held that, in the absence of statute, the state can recover from the estate of an insane person the reasonable value of maintenance furnished to him on the ground that those things furnished as required by law are necessities and his estate can be charged with such burden. 14 R. C. L. p. 566 * * *.

In 1936, the same Court, in the case of *Wiseman v. State*, 94 S. W. 2d 265, very arbitrarily announced:

This Court has reached the conclusion that the right of the State to reimbursement for care and maintenance of demented persons did not exist at Common Law. * * *

If the sovereign was without right of reimbursement from the estates of insane persons and the common law recognized no right to reimbursement by reason of an implied contract, why is the question even before this Court for its decision? Surely where there is so much smoke there must be a fire. The good reason and common sense of the authorities that hold for the right to reimbursement should persuade this Court to recognize and follow the positive rule established by the common law.

This right of the sovereign to reimbursement at common law was a liability limited strictly to the insane person and his estate. We have been able to find no decision to the contrary. This should argue favorably for the proposition that the common law rule for which we are contending was not the creation of the state courts that recognize the rule. If they were making such a rule, it would have been

simple for them to have extended the liability to include parents and children of the insane person.

The Supreme Court of Wisconsin announced the rule relating to the nonliability of relatives of an inmate of a state asylum for his support in the case of *In re Hahto's Estate*, 294 N. W. 500, as follows:

The practice of adjusting claims against those who may be responsible for maintenance of a member of their family while such member is an inmate of a state asylum has been outlined by the statutes for many years. The method has always included a provision for consideration of ability to pay on the part of one to be charged. As there is no direct liability independent of that imposed by statute—none existing at common law—the terms of the statute imposing the liability are to be followed in a proceeding to charge the maintenance against a wife, husband, or children.

In a similar vein the Appellate Division of the Supreme Court of the State of New York, in 1941, declared in part:

The incompetent had been an inmate of State institutions since September 19, 1912, and on October 22, 1926, had been transferred to Creedmoor State Hospital. * * * Apparently the incompetent was an adult during the period of her maintenance in Creedmoor State Hospital. Assuming therefor that she was an adult incompetent there was no common law obligation on the father to support her. *In re Hofmann's Estate*, 26 N. Y. S. 2d 430, 432.

The State of Pennsylvania which has held that the state, under the rule at Common Law is entitled to reimbursement from the estate of an insane person for his maintenance at a State institution (supra, p. 4) agrees with Wisconsin and New York that "at Common Law, the mere fact that an adult demented person is incapable of caring for himself raises no obligation on his parents' part to support him." *In re Erny's Estate*, 12 Atl. 2d 333, 337 Pa. 542.

Appellants cite a recent Texas case entitled *Wiseman v. State*, 94 S. W. 2d 265, 266 (Br. 52) as holding that the right of the state to reimbursement for the care and maintenance of demented persons did not exist at common law. May we point out that the decision was purely dicta, because Texas at the time had a statute completely covering the subject to the exclusion of any right at common law, as the Court itself pointed out. In support of its erroneous statement as to common law liability, the Court cited 32 C. J. 686, Sec. 373, 374. Appellants have already referred to the improper use of the word "dicta" by Corpus Juris in that reference (Br. 51).

Other cases worth considering, quoted or cited by the appellants in their brief (pp. 51 to 53), in support of their proposition that the weight of authority is against reimbursement at common law, are:

Brown's Committee v. Western State Hospital (Va.).

State v. Colligan (Ia.).

Baldwin v. Douglas (Neb.).

Commissioners, etc. v. Ristine (Ind.).

The first of those cases gave absolutely no authorities for its bald assertion quoted by the appellants (Br. 51). The Iowa Court in the second case evidenced its failure to search the authorities when it stated: "The *uniform rule* seems to be that there is no liability upon the part of the person who receives" care in a state hospital for the insane. The *Baldwin* case holds merely that a husband cannot be held to answer for the treatment of his wife furnished by the State in the interests of the general public. No mention is made of the liability of the wife or her estate.

The last of the four cases listed above was only cited by the appellants. We were impressed by the well-considered opinion of the two judges who disagreed with their three colleagues. We quote from the dissenting opinion:

The decedent was an insane person, and his condition was such that the public good, as well as his own benefit, required that he be confined. He had an ample estate to compensate those who might care for him, but no private person could be found prepared and willing to assume the burden and responsibility. The appellant was so situated that it could take the decedent to its poor asylum and give him proper care and attention without in any way abridging the rights and privileges of others supported at said institution. Under such circumstances we can imagine no satisfactory reason why the appellant should not be reimbursed.

II

The United States may maintain this action for reimbursement under the common law rule made applicable to Alaska by Congress

We agree that there is no common law of the United States as distinguished from the individual States. 15 C. J. S. 630, § 16; *U. S. v. Swierzbenski et al.*, 18 F. (2d) 685. However, Congress has expressly adopted the common law as the rule of decision in Courts for the Territory of Alaska, except insofar as it is inapplicable or inconsistent with the Constitution, the acts of Congress, or of the Territorial Legislature. Br. 30 and 31; 15 C. J. S. 631, § 17.

If it is true that, before any sovereign right of the crown recognized by the common law can prevail in favor of the national government, it must rest exclusively upon a federal statute (see *U. S. v. Bank of North Carolina*, 31 U. S. 19 (6 Pet. 29), 8 L. Ed. 308), we contend that such a federal statute was the Act of June 6, 1900 (31 Stat. 321, 552), which, among other things, adopted the common law for the Territory of Alaska.

The Territory of Alaska comes squarely within the definition of territory as declared in *Ex Parte Morgan*, 20 F. 298, 305 (quot *People ex rel. Kopel v. Bingham*, 29 S. Ct. 190, 211 U. S. 468, 475, 53 L. Ed. 286), namely:

A portion of the country not included within the limits of any state and not yet admitted as a state into the Union, but organized under the

laws of Congress, with a separate legislature, under a territorial governor and other officers appointed by the president and senate of the United States.

None of the territories is sovereign in the true sense of the word. As Justice Brewer observed in the case of *Talbott v. Silver Bow County*, 139 U. S. 439, 446 (11 S. Ct. 594, 35 L. Ed. 210) :

It (Territory) is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision.

Speaking again for the Supreme Court in the later case of *Binns v. U. S.*, 194 U. S. 486, 491 (24 S. Ct. 816, 48 L. Ed. 1087), Justice Brewer said :

* * * It (Congress) may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may entrust to them a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto.

In other words, Congress has power to govern and control the territories; and it may be said that Congress exercises as to territories the combined powers of the national and state governments. See *Oklahoma K. & M. I. Ry. Co. v. Bowling*, 249 F. 592.

If then a territory, such as Alaska, is an area in

which the Federal Government is the sovereign, just as within the boundaries of, say, the State of New York, the state government is the sovereign, and, if Congress can adopt for the Territory of Alaska the common law, including the rule that the estate of an insane patient shall reimburse the sovereign for public monies expended for the care of the patient, just as the New York Legislature has the power to adopt the common law for its domain, may not the United States as the sovereign in the Territory take advantage of that rule in any case originating in the Territory of Alaska just as the State which adopted the common law might take advantage of the rule?

It is a rule of law that legislative enactment which undertakes to provide a complete code of laws on a particular phase of human conduct, when its purpose so to do is manifest, will be deemed evidence of legislative intent to repeal common-law provisions on the same subject. *Silver Falls Lumber Co. v. Eastern & Western Lumber Co.* 40 P. (2d) 703, 149 Or 126; *Lutz v. State* 172 A 354 167 Md. 12. Therefore a statute designed to change the common law rule should speak in clear unequivocal terms. *Bryan v. Landis* 142 So. 650, 106 Fla. 19; *People ex rel Nelson v. West, etc., Bank*, 187 N. E. 525, 353 Ill. 451; *City of Corpus Christi v. Coffin* 35 S. W. (2d) 202 (Texas); *E. B. & A. C. Whiting Co. v. City of Burlington*, 175 A. 35, 106 Vt. 446, *In re Phalen's Estate* 222 N. W. 218, 197 Wisc. 336.

In the case of *Commonwealth v. Mason*, 15 S. E. 2d 114, the Supreme Court of Appeals of Virginia conceded that an insane person is liable for necessities

furnished him in good faith at a state hospital for the insane; but held that the rule was subject to a statutory provision of Virginia to the contrary. The applicable part of that statute read as follows:

SEC. 1058 (Code of Virginia). *When, to whom and by whom, expenses of insane * * * person are paid.*—The estate of any person committed to any hospital for the insane * * * shall not be charged with any expense incident thereto or for his maintenance therein.

If Congress had intended to change the common law rule as to the sovereign's right to reimbursement, it could easily have included that provision in the laws applicable to the care of the Alaskan insane.

The Act of Congress of June 6, 1900, *supra*, p. 10 "making further provision for a civil government for Alaska, and for other purposes," does make some provision for the care and custody of Alaska's insane, but nowhere does it abrogate the provisions of the common law relating to the right of the sovereign to be reimbursed by the estate of an insane person for the care and custody provided by the sovereign for such insane person. In fact, that Act, in Section 367 thereof, specifically adopts the Common Law for the District of Alaska (now the Territory of Alaska) insofar as it is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by the Congress. Nor is there any express abrogation of the common law provision under consideration in any of the later amendatory or supplementary acts of Congress relating to the care of the insane in Alaska as provided for in the Act of

June 6, 1900. And not until the passage of the Act of October 14, 1942, *infra*, did Congress see fit to change the common law rule then prevailing in the Territory of Alaska, and specifically provide who all should be liable to the sovereign for public monies expended for the care and treatment of the insane patients of Alaska. It is to be remembered that the law making body is presumed to have had the common law in mind when enacting the statutes for Alaska in question. *Garwols v. Bankers' Trust Co.* 232 N. W. 239, 251 Mich. 420.

No doubt, Congress realized when it passed the Act of June 6, 1900, that it was not providing a complete code of laws for Alaska, and was not covering every phase of the subject relating to the care and treatment of the insane in Alaska, and therefore adopted the common law to take care of all matters not specifically covered in this Act. Then in 1942 (56 Stat. 782, 785, *supra*) Congress enlarged the existing common-law provision as to the sovereign's right to be reimbursed out of the estate of the insane patient for public monies expended on his behalf and made even certain near relatives of the patient liable to pay, or contribute to, the charges for his care and treatment.

The appellant claims that the common-law right of the sovereign to reimbursement has been repealed by implication or abrogated, by the Act of June 6, 1900, *and especially by the repeal clause of the Act of January 27, 1905*, and especially by the repeal clause of the Act of January 27, 1905 (Br. 37, 38), because the common-law rule and the statute are inconsistent.

It is elementary that repeals by implication are not favored (59 C. J. 905, Sec. 510), especially where a repeal would impair a settled prerogative of the government. *Inyo County v. Hess*, 200 P. 373, 53 Cal. App. 415.

The fact that any Act of Congress, relating to the care of the insane in Alaska, prior to the Act of October 14, 1942 (56 Stat. 782), may have provided that "all acts and parts of acts inconsistent with this act are to the extent of such inconsistency repealed", or words to that effect, would not entitle the appellants to claim an express repeal of the common law. Such a repealing clause is at best a repeal by implication, and that can arise only if the common-law rule and the statute cannot be reconciled with each other by any reasonable interpretation. *State v. County Court*, 101 P. 905, 54 Or. 255 (reh. den. 103 P. 446).

Is there anything inconsistent or repugnant in the idea that the United States, to insure prompt and adequate care and treatment for Alaska's insane, regardless of their station or means, should arrange by special legislation to pay out of the public treasury the costs of such care and treatment, and the fact that the United States now asks to be reimbursed out of the estate of the insane person for the public monies so spent, as allowed to the sovereign under the common law applicable in Alaska? Is there not one rule that a physician shall care for the sick and ailing regardless of their ability to pay for his services; and is there not another rule, equally good and consistent with the first, that the physician is worthy

of his hire and entitled to be paid by the patient for the care afforded him, so far as the patient is able to pay?

It is significant that at page 24 of their brief the appellants announce in bold type that the “Common Law of England as to Idiots and Lunatics Has Never Been in Force in Alaska.” By the time they reached page 37 of their brief, the boldness, tempered by their own reasoning, has been reduced to the milder assertion that the Common Law was repealed or abrogated by Act of Congress. We would now insert the word “never” before the word “repealed” in the latter assertion.

Finally for further enlightenment upon the two propositions thus far advanced in our argument, may we urge upon the Court a careful reading and consideration of the scholarly opinion (R. 6-20), written by the trial judge who ruled against the appellants in their demurrer to the Government’s complaint.

Silence and nonaction do not militate against the Government

Quoting from the United States Supreme Court case on the subject, the appellants insist that the “nonaction or silence of Congress, will be deemed to be an action of its will, that no exaction or restraint shall be imposed, Br. 45-46. Instead of silence in our case, we hear Congress very definitely expressing itself that the common law shall apply in Alaska.

The fact that the agents of the Government failed to collect these many years from Gartner or his estate for his maintenance at Morningside Hospital should not militate against the sovereign. As was announced

by the Court in *Dandurand v. Kankakee County*, 63 N. E. 1011, 1013 (Illinois, 1902) “the failure to inaugurate some system of bookkeeping and of making charges against the insane patient” and “a failure of county officers to promptly ascertain and enforce the legal rights of the county” do not support the claim that the county did not intend to charge for its services to the patient.

It has been held in California that the State was not estopped to assert a claim for maintenance and care of an incompetent at a state institution for the period from April 2, 1930, to August 2, 1934, by silence through the years prior to 1930 with respect to collecting payment for the care of the incompetent, in the absence of proof that any disadvantage to the guardian. See *In re Fassetta's Estate*, 57 P. 2d 1336. While the appellants do not claim an estoppel in this case, they do claim that the silence and nonaction of the Government here evidenced an intent to dispense charity to the appellant Gartner. As a matter of fact, Gartner was not in need of charity; so his condition was not prejudiced by the long delay of the Government in commencing this action.

Estate has not been prejudiced by the failure of the Government to collect on a current basis. The claim presented in this action is the same as it would have been if collections had been begun ten, fifteen, or twenty years ago; and no contention is made by the appellants that any part of the claim has been paid by the insane person or his estate.

**Federal funds appropriated for the care of nonindigent Alaskan insane
not intended to be a gratuity or charity**

If Congress intended the public monies expended for the care and treatment of Alaska's nonindigent insane to be considered a gratuity or charity, as the appellants would have us believe (Br. 41-45), then why did it specifically provide in Sections 902 and 903 of said Act of June 6, 1900 (*supra*) as follows:

SEC. 902. Every guardian appointed under the provisions of this chapter shall pay all just debts due from his ward out of his personal estate, if sufficient, and if not, out of his real estate, upon obtaining a license for the sale thereof, as provided by law. * * * (Sec. 4527 Compiled Laws of Alaska, 1933.)

SEC. 903. The guardian shall also manage the estate of his ward frugally and without waste, and apply the income and profits thereof, so far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if the income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining a license therefor as provided by law, and shall apply the proceeds of such sale, so far as may be necessary, for the maintenance and support of the ward and his family. (Sec. 4528 C. L. A. 1933.)

We say again that it is reasonable to presume that Congress had in mind the common law rule of reimbursement due to the sovereign for the care and treatment of the insane when it passed the Act of June 6, 1900, and, without anywhere in said Act, or

in the amendments or supplements thereto negating the common law rule, actually made it the duty of the guardian of the estate of the insane ward to apply the income and profits of the estate, and, if necessary, the very principal, to the debts and to the comfort and suitable maintenance of the ward.

In support of the proposition just stated, see the decision in *Dandurand v. Kankakee County* (supra, p. 7) wherein the Illinois Court held the insane person's estate liable to the County hospital, especially where said person had an estate of about \$2,500.00 and no dependents and the statute required the guardian to apply the income and profit of the ward's estate, so far as might be necessary, to the comfort and suitable support of the ward. See also *In re Yturburru's Estate*, supra p. 5.

III

Profits from the estate, or lack thereof, not essential to this case

The appellants maintain that to make out a cause of action for reimbursement in this case, the government had to allege and prove that there were profits from the estate, and that the Court erred in refusing to permit the appellants to show the absence of such profits. Br. 7-12, 61, 62. We disagree.

George Gartner was not a pauper. It is true that the complaint does not specifically allege that he was a pauper, or was not a pauper; but, as the trial judge pointed out in his opinion (R. 7), the complaint does inferentially show that he had property for which a guardian was appointed on the 1st day of August,

1927. Further, the appellants have set forth in the Appendix to their brief an "Administrative Finding" of the Secretary of Interior, reciting that on August 12, 1944, the assets of the Gartner Estate amounted to \$9,986.10 and a patented mining claim.

If the contention of the appellants is correct, that for the Government to be entitled to a judgment against them in this action, it is necessary for the Government to first allege and prove profits in the estate, then it would be equally proper for every debtor to require the creditor to allege and prove the debtor's present ability to pay before a judgment for the debt could be rendered. Have the appellants considered that an insane person may have hidden his estate and any profits therefrom prior to his commitment; or that the insane person may come into a huge fortune tomorrow, with ample profits? In a case where the principal of the estate may be rapidly dwindling in the payment of protracted fees of administration, shall the government be required to stand by until it can show profits from the estate? Is not the insane person adequately protected by the laws pertaining to exemptions on execution? And what of a statute of limitations in some jurisdictions that might forever bar an action for reimbursement because before the running of the statute there were no profits from the estate, though such appeared later?

An argument such as the appellants have advanced regarding the necessity of showing profits was attempted with respect to principal assets in the Mis-

souri case of *Barry County v. Glass*, 160 S. W. 2d 808. Said the Court:

From the facts stated, we glean the opinion that the estate of the ward was only created by the participation by the ward in the expected distribution of the estate of the mother. Her estate had not yet been distributed. We are unable to see what difference it made whether or not the estate of the ward was sufficient at the time the judgment was rendered to pay the whole or any part of the judgment. Whether or not such judgment could be paid at the time it was rendered, is not and does not constitute the slightest defense to the rendition of the judgment. Such fact constitutes no defense, if the person against whom such judgment is rendered is liable to pay such judgment.

IV

Witness Haskins was qualified to give his opinion regarding reasonable value of care and treatment

It is assigned as error by the appellants that the Court permitted Dr. Haskins to give his opinion at the trial of this case as to the reasonable value of the care and maintenance provided George Gartner at Morningside Hospital from August 10, 1927, to October 13, 1942. (Br. 54-61.)

Dr. Haskins, who was the Government's only witness, testified that he was a University trained physician and surgeon, with four years' service in the Army medical corps, followed by seven years in the general practice of medicine. Since 1928 he has specialized in psychiatry and hospital administration

in hospitals for the insane, having specially qualified himself for such work by a year of graduate study in psychiatry at Columbia University. He has been the medical supervisor, employed by the Department of Interior of the United States, at Morningside Hospital at Portland, Oregon, since 1936. This Hospital which is owned by a private company, houses some 360 insane patients committed from the Territory of Alaska, for whose care and treatment the Government pays the company on a monthly per capita cost contract basis (R. 31-34).

The doctor further testified as to the kind and amount of care and treatment afforded the patients. He stated that the Company is required to furnish proper food, clothing, housing, recreational and therapeutic occupational facilities, medical supplies and dental work. He stated that he had visited at many mental hospitals from Massachusetts to California, including St. Elizabeths and veterans' hospitals, and, from observation, could state that the food and care afforded the patients at Morningside was much better than that provided in the average mental hospital in the United States (R. 35-39).

The doctor has known and frequently examined George Gartner at Morningside Hospital continuously since 1936, and has familiarized himself with the patient's case history and clinical record for the years 1927 to 1936. He then stated his opinion as to the reasonable value of the care furnished to Gartner for the period covered. That cost varied as the costs of living varied throughout the country generally and had been compared by the witness with the cost

of patient-care at other like institutions (R. 40-44, 65, 66). How else could the Government have better qualified the witness?

In *Miller v. Puget Sound Bridge & Dredging Co.*, 250 P. 64, a Washington case, it was held that generally, officers of a corporation, charged with the conduct of its business are qualified to testify as experts on questions relating to such business. The Court quoted 22 C. J. p. 593, where we read:

A witness who has observed the rendition of services, and has a sufficient familiarity with services of that nature to form a reasonable inference as to value, may state such inference.

The California Supreme Court held, in *Cowdery v. McChesney*, 58 P. 62, that a witness who had known the deceased and the kind of services performed for him by the plaintiff as housekeeper and nurse; and who had occupied a position at the State insane asylum as keeper of a ward, should have been allowed to testify on behalf of the plaintiff as to the reasonable value of plaintiff's services to said decedent.

Oregon holds that it was not usurping the functions of the jury for an expert in the employ of the plaintiff corporation to state his opinion as to the reasonable value of making certain below-grade excavations, especially where he was personally familiar with the job. *Porter Construction Co. v. Berry*, 298 P. 179.

We feel that this Court should not attach any weight to the lengthy argument of the appellants on their point (Br. 58-61) because they have not supported it by a single legal authority and their argument disregards the evidence in the case.

In *Lopey v. State* (*supra*, p. 7) the Court held that evidence of per capita cost at the state hospital for the insane given by the superintendent of the institution was admissible. We quote from the last paragraph of the opinion:

This evidence was given by the deposition of Dr. Powell, who has been connected with said hospital since the year 1900, and from 1911 to the time of the trial has been superintendent thereof. He testified from his own knowledge that Sansom had been an inmate of the said hospital since 1900; that during this time the state furnished Sansom with board, clothing, medical attention, assistance, support, and maintenance; that nothing has been paid the state for the upkeep of Sansom during the time he (Powell) has been superintendent; that he had access to, and supervision of, the records of the hospital, but did not make them himself; and that all the reports of the per capita costs of maintaining inmates of the hospital were made by him since August 31, 1911, from these records. These reports were required to be made by Article 125, *supra*, during the first days of January and July of each year. The witness did not have independent knowledge of the per capita cost, but was permitted over objection of appellant, to testify from the reports to the per capita cost of maintaining patients for the years 1912 to 1923, inclusive, and over such objection was permitted to testify that the reasonable compensation for the support of Sansom was the same amount as said per capita cost. We do not think this was error. * * *

The witness Haskins was certainly familiar with the per capita cost of caring for insane persons not only at Morningside Hospital but at other similar institutions throughout the country and was as fully qualified to testify in this case as Dr. Powell was in the *Lockey* case.

V

The contract price between the Government and the hospital corporation was properly admitted in evidence

During the years that Mr. Gartner was an inmate at Morningside Hospital there was an agreed contract price between the Government and the private operators of Morningside for the care of the patient at the Hospital. It was based on a per capita figure. To prove that the Government had actually paid the contract price it would have been necessary to subpoena witnesses and a lot of documentary evidence from the General Accounting Office at Washington, D. C. This was eliminated by the stipulation of the parties (R. 72-73), which set forth that various contract prices had been established between the Government and the Company respecting the matter, and that the Government had expended from the public funds and paid to said Hospital under said contracts the total sum of \$9,180.11.

Long before that stipulation was admitted in evidence, the appellants had established by their own cross-examination of the witness that there was such a contract price (R. 45, 51, 58). Furthermore the stipulation expressly provides that nothing therein contained shall be taken as establishing the reasonable

cost of the care and maintenance of the appellant Gartner at Morningside Hospital (R. 74).

In the case of *In re Frey's Estate*, 21 Atl. 2d 23, the Supreme Court of Pennsylvania held that an itemized statement issued by the State Department of Revenue, while clearly no evidence of the fact of nonpayment, might be prima facie evidence of the amount expended by the commonwealth for the support and maintenance of the decedent at the Harrisburg State Hospital for the insane.

The question may be resolved in favor of the admissibility of the contract price itself as evidence of value. For the correct rule is laid down in volume 32 of *Corpus Juris Secundum*, p. 1139, in these words:

The amount paid for services is not the criterion of their value, and is not, itself, sufficient to authorize a verdict. However, the contract price is some evidence of the reasonable value of services, and is sufficient in the absence of contrary evidence.

VI

The court did not err in directing a verdict on the uncontradicted evidence of Dr. Haskins

Finally, the appellants claim it was error for the Court to direct a verdict solely on the evidence of Dr. Haskins, especially inasmuch as his opinion was based entirely upon the contract price. We have already shown that, while the doctor's opinion as to the reasonable value of the care and treatment rendered to the insane person, Gartner, was the same as the

contract price, that opinion was based upon far more than the contract price. *Supra*, p. 18.

The appellants would also have this Court believe that they discredited the testimony of the doctor by showing, on cross examination, that his opinion as to reasonable value was for the same amount as the contract price. If anything, that tended only to confirm the correctness of the opinion.

In all of the cases cited by the appellants on the premise that opinion evidence must be submitted to the trier of the fact (Br. 63-65), the several witnesses called in each case disagreed among themselves as to the value, or other issue, in question; or, if there was only one witness called, he was not properly qualified as an expert or otherwise to express an opinion.

Speaking of the opinion evidence of four experts as to the value of certain oil leases in *Dayton Power & Lt. Co. v. Public Utilities Com'r*, 292 U. S. 290, 299, 54 S. Ct. 647, 652, the Supreme Court, before giving that portion of the opinion quoted by appellants (Br. 65), stated:

Variations so wide are sufficient of themselves to disprove the existence of a market in the strict or proper sense. * * * If they have any probative effect, it is that of expressions of opinions of men familiar with the gas business and its opportunities for profit.

Where the subject under consideration is one for experts or skilled witnesses alone and concerns a matter of science or specialized art or other matters of which a layman can have no common knowledge, the rule has been recognized that expert opinion evidence

in which no conflict exists is conclusive. *Peters v. Sacramento City Employees' Retirement System*, 80 P. 2d 179 (Cal.); *Prendergast v. Retirement Board*, 60 N. E. 2d 768 (Ill.); and *Coxson v. Atlanta Life Ins. Co.*, 179 S. W. 2d 943 (Texas).

Said the Supreme Court of Vermont in *Central Vermont Ry. Co., v. Bowers et al.*, 134 Atl. 608:

It is objected that the claim of the plaintiff as to the location of the parcels 6 and 7 was based solely upon the testimony of the civil engineer who was an expert witness; that the jury would not be bound as a matter of law to believe him; and that the rule is that the testimony of such a witness is to be received and weighed with great caution and narrow scrutiny. This is not an accurate statement of the rule (*Sheldon v. Wright*, 80 Vt. 298, 317, 67 A. 807), but whatever the rule as to its weight, when such evidence is uncontradicted and unimpeached and is founded upon established facts, as in the instant case, fairly warranting the conclusions reached, the issue does not become a jury question simply because it is supported only by the testimony of an expert.

CONCLUSION

We admit that the jury would not have been concluded by the testimony of Dr. Haskins if there had been any other evidence pertinent to the issue for them to consider. There was no such other evidence. Any other determination by the jury, if this had been a proper case to submit to them, would have been a mere arbitrary decision or guesswork. 32 C. J. S. 419, Sec. 572.

We submit that the judgment of the District Court should be affirmed.

Dated at Fairbanks, Alaska, September 8, 1947.

Respectfully submitted.

HARRY O. AREND,
*United States Attorney
and Attorney for Appellee.*

No. 11,623

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE GARTNER, an Insane Person,
and MIKE ERCEG, Guardian of the
Estate of George Gartner, an Insane
Person,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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Subject Index

	Page
Territorial statute of Alaska not a federal statute.....	1
Common law of Alaska—what embraced in.....	5
No right to reimbursement at common law.....	6
King's duty as to idiots and lunatics	7
At common law neither states nor municipalities were charged with the duty to support insane paupers or incompetents	9
The second contention of appellee is, that: the law implies an obligation on the part of the lunatic, or his estate, to reimburse public authorities who have supplied his neces- saries	12
Territorial law imposing duties on guardians of persons are local and confer no rights upon the United States.....	16
Appellee's contentions as to Haskins' testimony.....	17
Opinion of Haskins invades province of court and jury.....	19

Table of Authorities Cited

Cases	Pages
American La France F. E. Co. v. Borough of Shenandoah, 115 F. (2d) 866	15
Brown v. American Bonding Co., 210 Fed. 844.....	15
Ex parte Krause, 228 Fed. 547.....	2
Patrick v. Baldwin, 109 Wis. 342, 85 N. W. 274, 53 L.R.A. 613	11
State v. Ikey's Estate, 84 Vt. 363, 79 A. 850.....	7, 8, 14
State Department of Public Welfare v. Shively, 243 Wis. 276, 10 N. W. (2d) 215.....	10
The Conqueror, 166 U. S. 110, 41 L. Ed. 947.....	20
United States v. Spalding, 293 U. S. 498, 79 L. Ed. 617....	20

Statutes

Code of Civil Procedure, Section 367 (Act of June 6, 1900, C. 781, 31 Stat. 552)	5
Compiled Laws of Alaska, 1913, Section 796.....	2
Compiled Laws of Alaska, 1933, Section 4546 (Act of June 6, 1900, Sections 902, 903 and 918).....	16, 17
Compiled Laws of Alaska, Section 1907	2
Criminal Code, Section 218 (Act of March 3, 1899, C. 429, 30 Stat. 1285)	5

Texts

28 Am. Jur. 683, Section 43	10, 14
41 Am. Jur. 681, Section 2	11
Bae. Abr. tit. Idiots and Lunatics, C.	8, 9
Brooms, Legal Maxims 858	18
24 C. J. 741	18
32 C. J. 687, Section 373	14

TABLE OF AUTHORITIES CITED

iii

	Page
32 C. J. 710, Section 441	18
32 C. J. 740, Section 525	18
48 C. J. 432, 520, Section 202	11
17 C. J. S. 322-325, Section 6	13
43 C. J. S. 337, Section 119	19
44 C. J. S. 177, Section 75	10
Enc. Britannica, vol. 12 (1942), p. 389	9
21 R. C. L. 701, Section 2	11

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Appellee.

APPELLANTS' REPLY BRIEF.

TERRITORIAL STATUTE OF ALASKA NOT A FEDERAL STATUTE.

Appellee admits that its right to recover in this action is founded upon the common law of Alaska. (Appellee's Br. 11.) Appellee also admits that there is "no common law of the United States as distinguished from the individual States." (Appellee Br. 15.) Appellee does not controvert, but tacitly admits, "that before any right can prevail in favor of the National Government it must rest exclusively upon a Federal Statute." (Appellee's Br. 11.)

Appellee, however, undertakes to obviate the consequences of these admissions by attempting to ingraft

into the Federal Statutory System, Section 796 of the Compiled Laws of Alaska, 1913, which provides:

“So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by the Congress is *adopted and declared to be the law within the District of Alaska.*” (Emphasis ours.)

This attempted transformation of a local Territorial law into a Federal law is not only contrary to the rule that “the common law can be made a part of the Federal System only by legislative adoption,” (Opening Br. 13) but is also in conflict with the authorities.

In *Ex parte Krause*, 228 Fed. 547, the issue presented was whether the petitioner, in a habeas corpus proceeding, should be removed from the Western District of Washington, Northern Division, upon a complaint filed by the United States District Attorney, charging the petitioner with the commission of a crime within the Territory of Alaska, in violation of Section 1907 of the *Compiled Laws of the Territory of Alaska, codified and arranged by the Act of Congress of August 24, 1912.* (See Opening Br. 36, 37.)

The legal issue involved was presented by the allegation of the petition “*that, if a crime was committed, it was not an offense against the United States, but an offense against the Territory of Alaska*”.

Neterer, District Judge, in his opinion said (550):

“Sect. 410, Comp. Laws, Alaska, 1913 (Act August 24, 1912, c. 387, Sec. 3, 37 Stat. 512), provides that all laws of the United States heretofore

passed, establishing the executive and judicial departments in Alaska, shall continue in full force and effect until amended or repealed by Act of Congress; that, except as therein provided, all laws in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the territorial Legislature; that the authority granted to the Legislature to alter, amend, modify, or repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States.

There is, by this provision, clearly a line of demarcation placed by Congress between the local laws affecting the territory and the laws affecting generally all, of the states and territories. Section 2099, of the Laws of Alaska, *supra*, provide:

That: 'the common law of England as adopted and understood in the United States shall be in force in said district, except as modified by this act'.

This expression, I think, further emphasizes the line of demarcation suggested, as *it is fundamental that federal courts have no jurisdiction of common-law offenses, but are limited to acts made criminal by Congress, and Congress is charged with knowledge of this fact.* The common-law offenses by this provision are placed in the same category and relation as the offenses defined by the criminal code, and it would hardly be contended that this court would have jurisdiction to direct the removal of an offender against the common law of the territory.

The offense charged, kidnapping, is not an offense under any law of the United States to

which my attention has been directed, or one cognizable by the United States courts as such, *unless the adoption of the Alaska code by Congress makes this an offense against the United States. Congress, in passing this law, exercised its power as a local capitol legislature rather than in its power as a general government of the United States*, Allen v. Meyers, 1 Alaska 114. The intention of Congress undoubtedly was to constitute the 'Alaska Criminal Code,' taken largely from the Oregon Criminal Code, which was extended to Alaska in 1884, a territorial act, as distinguished from the laws of the United States. Jackson v. United States, 102 Fed. 478, 42 C.C.A. 452; United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631.

The Compiled Laws of Alaska have no greater force than a law enacted by a territorial Legislature, subject to congressional approval, *and as such its provisions are not laws of the United States and do not come within the cognizance of the United States courts*. Maxwell v. Federal Gold & Copper Co., 155 Fed. 111, 83 C.C.A. 570; In re Moran, 203 U. S. 96, 51 L. Ed. 105; United States v. Jones, Adms., 236 U. S. 106, 59 L. Ed. 488. Chief Justice Marshall, in United States v. Burr (No. 14,694) 25 Fed. Cas. 188, says: 'No man can be condemned * * * in the Federal Courts on a State law.' '' (Emphasis ours.)

We have emphasized the language of the Court "that it is fundamental that the federal courts have no jurisdiction of common law offenses, but are limited to acts made criminal by congress, and that congress is charged with the knowledge of this fact" as

it refutes the reasoning of appellee's brief under the heading "The United States may maintain this action for reimbursement under the Common Law rule made applicable to Alaska by Congress." (Appellee's Br. 15.)

It is clear from the foregoing authorities that the Territorial statute is not a Federal law of the United States and that when Congress passed the Act of April 28, 1904, providing that:

"the cost of * * * caring for the insane to be paid from appropriations to be made for such service upon estimates to be submitted to Congress annually" (Opening Br. 33)

it was charged with knowledge that:

"As the Federal Government does not have a customary common law of its own, distinct from the states themselves, it necessarily results that the right itself must depend exclusively upon a federal statute." (Opening Br. 24.)

COMMON LAW OF ALASKA—WHAT EMBRACED IN.

Before considering the various contentions of appellee we desire to point out, that,

The Common Law adopted in Alaska by Sections 367 (Act of June 6, 1900, C. 781, 31 Stat. 552) of the Code of Civil Procedure, and 218 of the Criminal Code (Act of March 3, 1899, C. 429, 30 Stat. 1285) is that body of law described by the Supreme Court of the United States,

“in *Patterson v. Winn*, 5 Pet. 241, 8 L. Ed. 108, as follows:

‘The term “common law” means both the common law of England, as opposed to the written or statute law, and the statute passed before the immigration of the first settlers to America’.

This latter definition, furnished by the Court of last resort for Alaska, would seem to be the one that should control this in its application of the common law to the case at bar.”

Valentine v. Roberts, 1 Alaska 536, 541.

NO RIGHT TO REIMBURSEMENT AT COMMON LAW.

The number one headline of appellee’s brief is, that, “At Common Law the Sovereign was entitled to reimbursement from the estate for the public monies spent in the care of an insane person.” (Appellee’s Br. 4.)

In support of this conclusion, appellee contends:

First. That by the Common Law of England it is the duty of the King to take care of all of his subjects who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves.”

Second. That the law implies an obligation on the part of the lunatic, or his estate, to reimburse public authorities who have supplied his necessities.

KING'S DUTY AS TO IDIOTS AND LUNATICS.

The language of appellee's first contention, as above set forth, is a quotation from the opinion of the Supreme Court of Vermont in *State v. Ikey's Estate*, 84 Vt. 363, 79 A. 850, and is dictum pure and unadulterated.

The issue determined, in the case (quoting from syllabus) was that:

“The after acquired property of an insane person, committed as a public charge, is liable for his support and maintenance under the Acts Vt. 1890, No. 20, providing that whenever any insane person, supported by the state, shall, after his commitment, possess any estate, it shall be appropriated for his support, and Acts 1906, No. 105, Secs. 4, 5, respectively, providing that the cost of maintaining insane poor, shall be ascertained by the auditor and that it shall be collected out of any estate such insane person may have at his death and that the statute of limitations shall not apply to these claims.”

We have no fault to find with the determination of the Court upon points required to be decided to reach a final judgment. But we submit that the case is not authority upon points not necessary to its determination. The liability sought to be enforced rested entirely upon the Vermont Statutes; and the question as to whether or not by the Common Law of England it was the duty of the King to take care of insane persons was not involved in any way. The opinion of the Court upon this point was “a gratuitous opinion that bindeth none; * * * not even the lips that utter it.”

Furthermore, the dictum is not well-considered dictum, as is evidenced by the fact that the legal-historic authorities cited and quoted to support it—in reality belie it.

The same is also true of the dictum of the Court, that:

“It is manifest from the statutory regulations in this respect that *the policy of the state is as at common law*, that the estates of such wards shall be appropriated to their proper maintenance, before they can be supported at the expense of the state.”

The unsoundness of this dictum most forceably presents itself, because of the fact that immediately preceding it, the Court points out that:

“Pollock and Maitland in their history of the English Law (vol. 1, p. 464) say this document known as *Praerogativa Regis* seems to be the oldest that gives any clear information about the wardship of lunatics. ‘The king is to provide that the lunatic and his family are properly maintained out of the income of his estate, and the residue of it is to be handed over to him upon his restoration to sanity, or should he die without having recovered his wits, is to be administered by the ordinary for the good of his soul; but the king is to take nothing to his own use.’ *Bac. Abr. tit. Idiots and Lunatics, C.*”

This quotation from Bacon’s Abridgment contains the very pith and substance of the common law, in so far as it relates to the king’s duty to provide for the maintenance of lunatics and their families. And it

shows, conclusively, that *it was not the policy of the common law, as stated by the Vermont Court, to appropriate the estates of lunatics to their proper maintenance, but that on the contrary it was the explicit policy of the common law, so declared by statute, "that lunatics shall be properly maintained out of the profits of his estate"; and, also, "that their lands and tenements shall be safely kept without waste or destruction * * * to be delivered to them when they come to right mind"* (Opening Br. 12.)

Singularly, appellee, in quoting from the opinion in the *Ikey's Estate* case, *asterisked* the above quotation from Bacon's Abridgment.

**AT COMMON LAW NEITHER STATES NOR MUNICIPALITIES
WERE CHARGED WITH THE DUTY TO SUPPORT INSANE
PAUPERS OR INCOMPETENTS.**

The asylum treatment of the insane was unknown in England, until the middle of the 19th century. It was not until then that the conscience of the people awoke, and there began to be made available for the insane, asylums specially constructed for their isolation and treatment. We have set forth in the appendix an excerpt from Enc. Britannica, vol. 12 (1942), p. 389, that graphically portrays the barbaric treatment of the insane that prevailed in Europe until the middle of the 19th century; and which shows that up until that time there was no special provision provided by the Sovereign for their care or maintenance, and that they were provided for by the poor laws, and in many instances treated as criminals.

In 44 C. J. S. 177, sec. 75, it is said:

“At common law, states and municipalities were not charged with the duty of supporting insane or incompetent persons. The liability for supporting such persons, however, may be, and often is, imposed by statute on various public authorities on certain conditions. This liability being statutory, the particular public authorities can be held liable in no case and in no other manner except as prescribed by statute.”

See, also,

28 *Am. Jur.* 683, Sec. 43.

In *State Department of Public Welfare v. Shively*, 243 Wis. 276, 10 N.W. (2d) 215, it was held that, at common law, states and municipalities were not charged with the duty to support poor, insane or incompetent persons, and that the duty of municipalities and states in such respects is wholly statutory. The Court in its opinion, said (220, 221):

“Counsel argues that an action may be maintained under the common law for necessities furnished a person in need against relatives charged with support and that the right of the State in that regard is the same as that of an individual. *It is true that an individual may maintain such an action* but that fact does not sustain counsel’s position in this case. There are no common law precedents for plaintiff’s position for the reason that *at common law states and municipalities were not charged with the duty of supporting poor, insane or incompetent persons.* The duty of municipalities and states in this respect is wholly statutory. *Patrick v. Town of Baldwin*

(1901), 109 Wis. 342, 85 N.W. 274, 53 L.R.A. 613. See *Coffien v. Town of Prible*, 142 Wis. 183, 125 N.W. 954, 27 L.R.A. N.S. 1079.”

“The care of the state for its dependent class is considered by all enlightened people as a measure of its civilization, and the case of the poor is generally recognized as among the unquestioned objects of public duty, but in spite of this, the duty under the common law was purely moral and not legal.”

21 *R. C. L.* 701, Sec. 2;

Patrick v. Baldwin, 109 Wis. 342, 85 N.W. 274, 53 L.R.A. 613;

48 *C. J.* 432, 520, Sec. 202.

“There is therefore no legal obligation at common law on any of the instrumentalities of government to furnish relief to paupers. The obligation to support such persons results only from Statute.”

41 *Am. Jur.* 681, Sec. 2.

“The reason for this seeming barbarity of the common law was that matters of charity were thought to be more appropriate for the church and by parishioners, so that none of them die for want of sustenance”.

21 *R. C. L.* 701, Sec. 2.

The lower Court in its opinion (R. 9) states, that, “a distinction between poor persons and insane persons is made not only at common law, but in modern statutes.” This is true as to modern statutes, but is not true at common law, except as to lunatics pos-

sessed of estates, as is clearly shown, by the foregoing citations.

It is manifest from the foregoing, that at common law there was no duty imposed upon the sovereign to provide for the care and maintenance of lunatics or paupers. The poor—including idiots and lunatics without estate—were dependent entirely upon religious charitable benevolence. Idiots and lunatics possessed of estates were the wards of the king, by virtue of his prerogative. The king, as guardian, had the duty of maintaining competently his wards and their households out of the profits of the estate. The king was no more obligated to furnish maintenance for his ward out of his own pocket or from public funds, than a statutory guardian, in Alaska or in California, is required to use his funds for the maintenance of his ward. In view of this fact, we are unable to understand how there could be any “*reimbursement of public funds*”, when in the nature of things, there could be no public funds legally expended.

THE SECOND CONTENTION OF APPELLEE IS, THAT: THE LAW IMPLIES AN OBLIGATION ON THE PART OF THE LUNATIC, OR HIS ESTATE, TO REIMBURSE PUBLIC AUTHORITIES WHO HAVE SUPPLIED HIS NECESSARIES.

From motives of public policy and benevolence, the United States, as *parens patriae* for Alaska, has appropriated funds annually ever since 1906, for the care and maintenance of the legally adjudged insane of Alaska, as a part of the “*Civil Expense of Govern-*

ment''. There is no Federal law that makes the individual beneficiaries of this fund liable to the United States for the necessities furnished them under the acts of Congress. The government now seeks, however, to have appellant Gartner declared a debtor for the necessities furnished him, on the basis of a promise implied by law—a quasi-contract.

“Contracts implied in law, or more properly quasi or constructive contracts, are a class of obligations which are imposed or created by law, without regard to the assent of the party bound, on the ground that they are dictated by reasons of justice and which are allowed to be enforced by an action *ex contractu*. They rest entirely on a legal fiction and are not contract obligations at all in the true sense, for there is no agreement; but they are clothed with the semblance of contracts for the purpose of the remedy. * * * Among the instances of quasi or constructive contracts are those * * * cases in *which an obligation to pay money is imposed by a statute.*”

17 *C. J. S.* 322-325, Sec. 6.

In most of the States, statutes have been enacted making an insane person and his estate liable for his maintenance in State or County hospitals. It is upon the decisions of the Courts of some of these states, construing these statutes, that appellee relies to sustain his contention of an implied contract. In all of these States the common law is in force.

In all of the cases, cited by appellee, the legislatures of the States imposed a duty upon the State, County or Municipality, to provide for the care of

the insane; and also imposed upon the insane person and his estate, the obligation to pay for the cost of his maintenance. In none, of the cases cited, was the question as to what was the rule at common law, directly or indirectly, involved. Some, of the cases cited, deal entirely with the constitutionality of such laws. Others contain dicta that *dogmatically* assert that the obligation to pay exists at common law; but none except *State v. Ikey's Estate*, supra, consider what the rule at common law was. Within the limits of this brief, we cannot consider these cases in detail. We are able to state, however, that they fully support the statement in 32 *C. J.* 687, Sec. 373, that:

“While there is some dicta to the effect that, under the common law, the estate of a lunatic was liable for his maintenance at public expense, the statutes conferring the right on public authorities to sue being merely declaratory of the common law and providing a remedy for the collection of an existing debt, it is generally held *that at common law and in the absence of express contract or deception as to the ability to support himself, the public authorities may not recover from the lunatic or his estate the expenses incurred on his account, * * **”. (Emphasis ours.)

It is the statute that creates the implied promise to pay—the quasi contract. Congress has not imposed any such obligation, either by Federal or Territorial law, upon the insane of Alaska to pay for their care at Morningside. Without such a statutory duty being imposed there can be no contract implied by law.

28 *Am. Jur.* 683, Sec. 43.

“A quasi contract arises where the law imposes a duty upon a person not because of any expressed or implied promise on his part to perform it but even in spite of any intention he may have to the contrary. To the same effect is Comment (a) to the restatement of contracts 5, that: ‘Implied contracts must be distinguished from quasi contracts, which also have often been called implied contracts or contracts implied in law. Quasi contracts, unlike true contracts are not based on the apparent intention of the parties to undertake the performances in question nor are they promises. *They are obligations created by law for reasons of justice.*’ ” (Emphasis ours.)

American La France F. E. Co. v. Borough of Shenandoah, 115 F. (2d) 866.

We ask, what law has created the implied promise in this action? *There is no Federal statute and there is no common law of the United States.*

And in this connection we desire to point out the failure of appellee to refer in any way to the decision of this Court in *Brown v. American Bonding Co.*, 210 Fed. 844 (Opening Br. 16, 17), in which this Court held, that the adoption of the common law, by a state, did not carry with it the prerogatives of the king.

Also appellee’s complete failure to answer our contention (Opening Br. 24-33) that when the common law was adopted for Alaska by the act of June 6, 1900, the Oregon laws, that were in force in Alaska at the time, wholly and completely covered the entire subject of the care and maintenance of the in-

sane, and that by reason thereof, the common law relating to idiots and lunatics was never enforced there.

TERRITORIAL LAW IMPOSING DUTIES ON GUARDIANS OF PERSONS ARE LOCAL AND CONFER NO RIGHTS UPON THE UNITED STATES.

Appellee, in its brief 23, asks, that if Congress intended the funds appropriated for the care of insane to be a gratuity or charity, why did it provide in secs. 902 and 903 of the Act of June 6, 1900, that it is the duty of a guardian of the person to apply the income and profits, and if necessary the principal, to the debts and to the comfort and maintenance of his ward.

These sections were a part of the Laws of Oregon that were adopted for Alaska, by the Act of Congress of May 17, 1884, and when Congress by the Act of June 6, 1900, reenacted the provisions of the Oregon code it merely continued these sections in force.

These statutes were in force in Oregon for many years prior to May 17, 1884. The legislature of Oregon was evidently of the opinion, however, that the cost of the care of an insane person, in the State Asylum, was not a "just debt" within the meaning of the statute—otherwise, why did the Oregon legislature deem it necessary to provide, by the Act of October 18, 1878, that when an

“insane person committed under this act shall be found to own any estate, real or personal, said judge shall immediately, without petition or notice, appoint a *guardian for the estate of such*

*person, who shall execute his trust under the direction of said court, * * * and said estate shall be liable to the county for the cost of such commitment, and to the state for the cost of conveying such insane or idiotic person to the asylum and keeping him while there.*” (Opening Br. 27.)

Furthermore, these sections 902 and 903, and also section 918, of the Act of June 6, 1900 (C.L.A. 1933, sec. 4546) are limited to guardians of wards, and do not include guardians of the estates of insane persons. Erceg’s guardianship is limited to the estate of Gartner.

These laws are local municipal laws for the government of the people of Alaska and they do not confer on the United States the right to charge for the care of insane persons committed under its direction at Morningside or elsewhere.

APPELLEE’S CONTENTION AS TO HASKINS’ TESTIMONY.

Appellee contends that the per capita contract price agreed to by the United States and the Sanitarium Company, for the care of the insane of Alaska, is evidence of the reasonable cost of the care and maintenance of Gartner at Morningside, and that the contract price was properly admitted in evidence.

Counsel for the government in making this contention, has overlooked one of the most important maxims of evidence, viz.: *Res inter alios acta alteri nocere non debet*, that prevents a litigant party from being

concluded or even affected, by the evidence, acts, conduct, or declarations of strangers. The literal translation of this maxim is "A transaction between two parties ought not to operate to the disadvantage of a third."

Brooms, Legal Maxims 858;
24 *C. J.* 741.

Under this rule Gartner could not be "*concluded*" by the contract price entered into between the United States and the Sanitarium Company, nor was it admissible against him for any purpose. It may be that a contract price agreed to by the parties to an action may be some evidence of reasonable value. But that is not the question here. Here appellee is seeking to recover for *necessaries furnished in the total sum of \$9,180.11*, and has failed to show the items that go to make up that amount or their reasonable cost. The general rule is that where the estate is liable for necessities furnished the ward, that "the recovery is limited to the actual amount expended with interest. The reasonableness of the claim is a question for the Court and jury after hearing and considering the evidence.

32 *C. J.* 710, Sec. 441.

In determining what are necessities for an insane person, so as to render him liable therefor, substantially the same rules apply as in the case of infants. It is whatever is reasonably necessary, for his support, maintenance, care and comfort according to his condition in life.

32 *C. J.* 740, Sec. 525.

“The question as to what are necessities is a mixed one of law and fact. Whether articles are of those classes for which an infant shall be bound to pay is a matter of law for the court; if they fall under these general descriptions, then whether they were actually necessities and suitable to the condition and state of the infant is a question of fact for the jury.”

43 *C. J. S.* 337, Sec. 119.

**OPINION OF HASKINS INVADES PROVINCE OF COURT
AND JURY.**

In this action the witness Haskins has usurped the function of both the Court and Jury. The ultimate issue to be determined in this case as set forth in the complaint is “the reasonable cost of the care and maintenance of said defendant”, at Morningside. (R. 4.)

There was no testimony introduced as to the items of necessities furnished, their kind, quantity, or quality or reasonable cost.

The witness Haskins in response to the question:

“Q. Now, Dr. Haskins, I would like to have you state to the jury what, in your opinion, was the reasonable value of the care and maintenance provided Mr. George Gartner at Morningside Hospital, on a monthly basis, per month during 1927?” answered:

“About \$52.00 a month.” (R. 42, 43.)

This question was repeated for each year from 1928 to 1942, inclusive, and all were answered over objections. (R. 43, 44.)

These questions and answers involved the determination of questions of law and fact, and invaded the province of both the Court and Jury. It allowed the witness to adjudge the question of what are necessities; and took from the jury the right to determine whether the necessities were actually necessary and suitable for the care and maintenance of Gartner and also their right to determine their reasonable cost. This was highly improper, and the language of the Supreme Court of the United States, in *United States v. Spalding*, 293 U. S. 498, 505, 79 L. Ed. 617, 623, is apropos. It is as follows:

“Moreover, that question is not to be resolved by opinion evidence. It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge’s instructions as to the meaning of the crucial phrase and other questions of law. The experts ought not to have been asked or allowed to state their conclusions on the whole case.” (Citing cases.)

In answer to the contention of appellee (Br. 31) that the Court did not err in directing a verdict on the uncontradicted evidence of Dr. Haskins, we will quote from *The Conqueror*, 166 U. S. 110, 133, 41 L. Ed. 947, as follows:

“In short, as stated by a recent writer upon expert testimony, the ultimate weight to be given

to the testimony of experts is a question to be determined by the jury; and there is no rule of law which requires them to surrender their judgment, or to give a controlling influence to the opinion of scientific witnesses. Rogers, Expert Testimony, sec. 207 * * *'' (Citing cases.)

We respectfully submit that the judgment should be reversed, with a direction that the action be dismissed.

Dated, Fairbanks, Alaska,
November 17, 1947.

Respectfully submitted,
JOHN L. MCGINN,
COLLINS & CLASBY,
Attorneys for Appellants.

(Appendix Follows.)



Appendix.

Appendix

HOSPITAL TREATMENT OF INSANITY.

“The era of real hospitals for the insane may be said to have begun in the 19th century, although there have been established here and there in different parts of the world certain asylums or places of restraint before this period. The prevailing idea of the pathology of insanity in Europe during the middle ages was that of demoniacal possession. The insane were not sick, but possessed of devils, and these devils were only to be exorcised by moral and spiritual agencies. Mediaeval therapeutics in insanity adapted itself to the etiology of that period. Torture and the cruelist forms of punishment were employed. The insane were regarded with abhorrence, and were frequently cast into chains and dungeons.

Until as late as the middle of the 18th century, mildly insane persons were cared for in shrines, or wandered homeless about the country. Such as were deemed a menace to the community were sent to ordinary prisons or chained in dungeons. Thus large numbers of lunatics accumulated in the prisons, and slowly there grew up a sort of distinction between them and criminals, which at length resulted in a separation of the two classes. In time many of the insane were sent to cloisters and monasteries, especially after these began to be abandoned by their former occupants. Thus “Bedlam” (Bethlehem Royal Hospital) was originally founded in 1242 as a priory for the bretheren and sisters of Order of the Star of Bethle-

hem, and was rebuilt as an asylum for the insane in 1676.

Pinel, in 1792, struck the chains from the lunatics huddled in the Salpetriere and Bicetre of Paris, and called upon the world to realize the horrible injustice done to this wretched and suffering class of humanity; but 25 years later, the insane, every where in Europe, were still treated with brutality, and it was not until 1938 that in France they were all transferred from small houses of detention, work houses and prisons, to asylums specially constructed for this purpose.

No great advance in the humane and scientific care of the insane was made until the middle of the 19th century.”

Enc. Britannica, Vol. 12 (1942), 389.

No. 11625

see vol. 2470

United States

Circuit Court of Appeals

For the Ninth Circuit.

ESTATE OF BELLE ALICE HAMBURGER
NATHAN, Evelyn Hamburger, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

In Two Volumes

VOLUME I

Pages 1 to 312

Upon Petition to Review a Decision of the Tax Court
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Petition to Conform to Proof	20
Answer	17
Answer to Amended Petition	23
Appeal:	
Motion to Amend the Title of the Above- Entitled Action on	492
Appearances	1
Certificate of Clerk of Tax Court	506
Decision	67
Docket Entries	2
Memorandum Findings of Fact and Opinion	
Findings of Fact	36
Opinion	54
Motion for Rehearing	60
Motion for Reconsideration	62
Motion for Review by the Full Court of the Opinion Entered in the Above-Entitled Mat- ter July 17, 1946	65
Motion to Amend Petition for Review of De- cision of the Tax Court of the United States	496
Motion to Amend the Title of the Above- Entitled Action on Appeal	492
Notice of Filing Petition for Review	491
Order Amending Memorandum of Findings of Fact and Opinion	59

INDEX	PAGE
Order and Decree Settling Final Account and for Distribution	313
Petition	5
Exhibit A—Letter dated 12/27/43, State- ment Form of Waiver	10
Petitioner's Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed	500
Petition for Review of Decision of The Tax Court of the United States	477
Proceedings	69
Opening Statement on Behalf of Petitioner	94
Opening Statement on Behalf of Re- spondent	102
Stipulation of Facts	374
Exhibits:	
1—Balance Sheet	381
2—Profit and Loss Statement	383
3—Dividends Declared	384
4—Balance Sheet	385
5—Profit and Loss Statement	390
6—Dividends Declared	391
7—Indenture of Sublease	392
8—Indenture of Lease	427
9—Moody's Manuel of Investments ..	457
Exhibits, Respondent:	
A—Order and Decree Settling Final Ac- count and for Distribution	313
C—Note dated 1/1/38	352
D—Note dated 1/1/38	357
E—Note dated 1/1/38	363
F—Note dated 1/1/38	369

INDEX

PAGE

Witnesses, Petitioner:

Eitner, Adolf

—direct	120
—cross	134
—redirect	143, 160, 166
—recross	152, 163

Milliken, John B.

—direct	105
—cross	108

Mitchell, Shepard

—direct	70
—cross	82
—redirect	91

Sparks, Louis P.

—direct	111
—cross	114

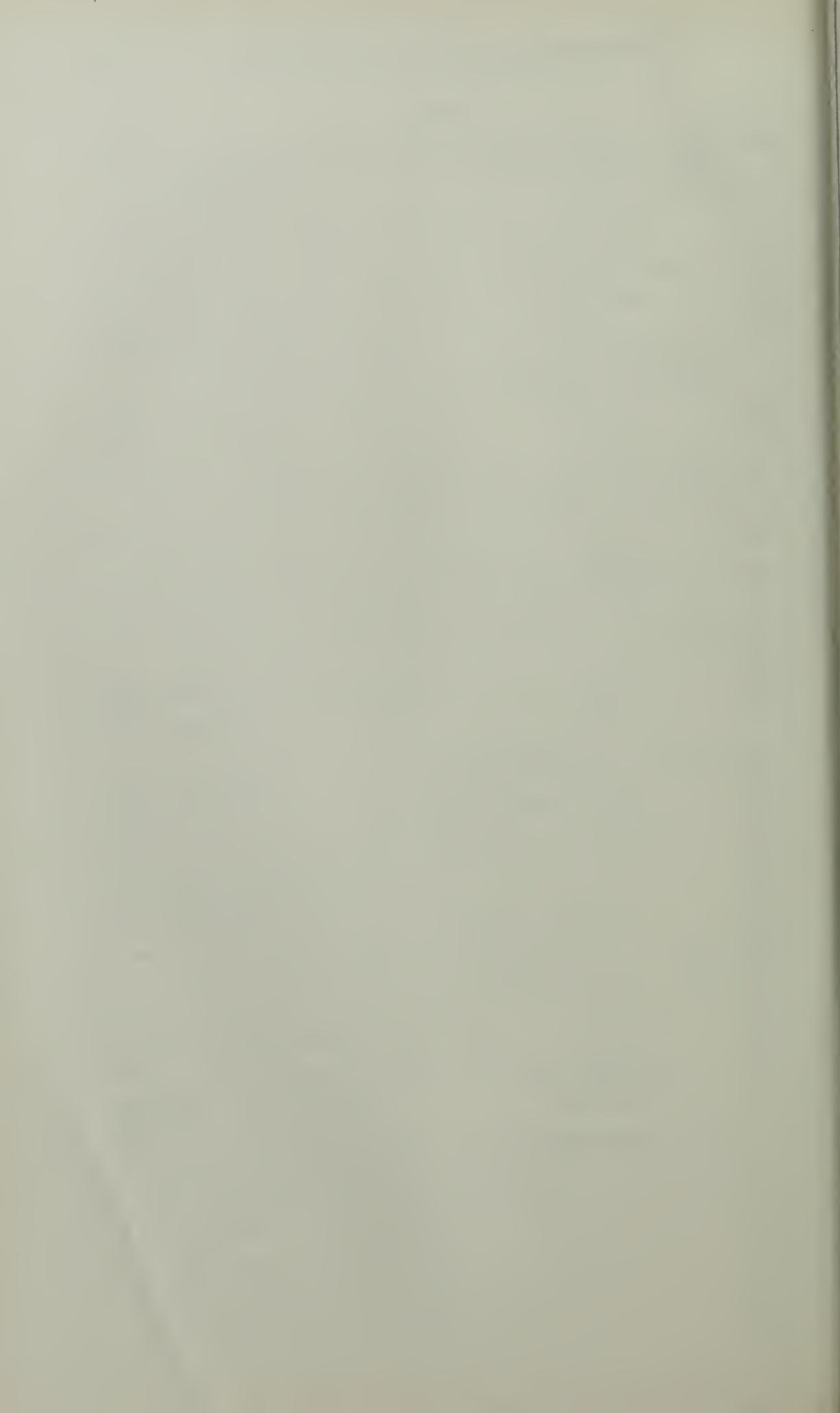
Walker, Theron W.

—direct	167, 231, 236
—cross	181
—redirect	192, 199, 209, 218, 229
—recross	196, 203, 224

Witnesses, Respondent:

Allen, Edward H.

—direct	237
—cross	262
—redirect	308
—recross	309



APPEARANCES

For Taxpayer:

CLAUDE I. PARKER, ESQ.,

RALPH W. SMITH, ESQ.,

L. A. LUCE, ESQ.,

J. EVERETT BLUM, ESQ.

For Commissioner:

E. A. TONJES, ESQ.

Docket No. 3992

ESTATE OF BELLE ALICE HAMBURGER
NATHAN, P. L. NATHAN et al., Executors
[Amended Title: (See Order of 3/31/47), Es-
tate of Belle Alice Hamburger Nathan, Evelyn
Hamburger, Executrix],

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transferred to Judge Harlan 3/4/46

DOCKET ENTRIES

1944

- Feb. 9—Petition received and filed. Taxpayer no-
tified. Fee paid.
- Feb. 9—Copy of petition served on General Coun-
sel.
- Mar. 28—Answer filed by General Counsel.
- Mar. 28—Request for hearing in Los Angeles, Cali-
fornia.
- Mar. 31—Notice issued placing proceeding on Los
Angeles, Calif., calendar. Service of an-
swer and request made.

1945

- Jan. 2—Hearing set February 19, 1945, in Los An-
geles, California.
- Jan. 29—Motion for continuance to the next Los
Angeles, calendar filed by taxpayer.
1/30/45 Granted.

1945

Aug. 14—Hearing set 10/1/45 in Los Angeles, California.

Oct. 4

and 5—Hearing had before Judge Mellott on merits. Appearance of J. Everett Blum as counsel filed. Stipulation of facts, amended petition and answer to amended petition filed. Briefs due 11/19/45. Replies 12/19/45.

Nov. 6—Transcript of hearing 10/4/45 filed.

Nov. 6—Transcript of hearing 10/5/45 filed.

Nov. 19—Motion for extension to Dec. 6, 1945, to file opening brief and Jan. 7, 1946, to file reply brief, filed by taxpayer. 11/20/45 Granted.

Nov. 19—Brief filed by General Counsel. Served 12/1/45.

Dec. 7—Brief filed by taxpayer. (1) Copies received 12/10/45. Served 12/11/45.

1946

Jan. 7—Reply brief filed by taxpayer. 1/8/46 Copy served.

July 17—Memorandum findings of fact and opinion rendered. Judge Harlan, Div. 11. Decision will be entered under Rule 50. Copy served 7/18/46.

July 22—Order amending memorandum findings of fact and opinion, entered.

Aug. 15—Motion for review by the Full Court with points and authority in support thereof, filed by taxpayer. 8/20/46 Denied.

1946

Aug. 15—Motion for rehearing filed by taxpayer.
8/19/46 Denied.

Aug. 15—Motion for reconsideration filed by taxpayer. 8/19/46 Denied.

Dec. 4—Respondent's computation for entry of Decision filed. [1*]

Dec. 10—Hearing set 1/8/47 on settlement.

Dec. 23—Consent to settlement filed by taxpayer.

Dec. 31—Decision entered. Judge Harlan, Div. 11.

1947

Mar. 25—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Mar. 25—Proof of service filed.

Mar. 25—Statement of points to be relied upon and designation of record to be printed, filed by taxpayer.

Mar. 31—Motion to amend title of the above entitled action on appeal, filed by taxpayer.
3/31/47 Granted. Proof of service thereon.
Affidavit attached.

Mar. 31—Motion to amend petition for review of Decision of The Tax Court of the United States, embodying amendment, filed by taxpayer. 3/31/47 Granted.

Apr. 2—Copy of motion to amend served on General Counsel.

Apr. 15—Designation of record with proof of service thereon filed by taxpayer. [2]

* Page numbering appearing at top of page of original certified Transcript of Record.

[Title of Tax Court and Cause.]

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, LA:ET:90D:NAB, dated Dec. 27, 1943, and as a basis for their proceedings allege as follows:

1. That your petitioners are the duly appointed, qualified and acting Executors of the Estate of Belle Alice Hamburger Nathan, deceased, having been so appointed by the Superior Court of the State of California, in and for the County of Los Angeles; their residence for mail in this proceeding being 808 Bank of America Building, 650 South Spring Street, Los Angeles 14, California.

2. The notice of deficiency (a copy of which is attached hereto marked Exhibit "A") was mailed to petitioner on Dec. 27, 1943.

3. The taxes in controversy are deficiency federal estate taxes in the amount of \$103,177.16, and in addition thereto the sum of \$51,229.95 being overpayment of federal estate taxes on Form 706, or the total controversial tax of \$154,407.11. [3]

4. The determination of said tax set forth in said notice of deficiency is based upon the following errors:

(a) Respondent erred in determining a value in excess of \$212,908.50 on the 425.817

shares of stock of the A. Hamburger & Sons, Inc., a California corporation, described under Item 37 of Schedule B of Form 706, and under Item 37 on Page 3 of Exhibit "A" hereto attached.

(b) Respondent erred in determining a value in excess of \$220,162.16 on the 104.167 shares of stock of the Hamburger Realty Company, a California corporation, described under Item 38 of Schedule B of Form 706, and under Item 38 on Page 3 of Exhibit "A" hereto attached, and erred in failing to accept as the market value thereof the said sum of \$220,162.16 as returned.

(c) Respondent erred in failing to allow as a deduction additional compensation for the Executors, in relation to the administration of the estate and the handling of death tax matters and the prosecution of this appeal, in the sum of \$10,000.00 over and above the fees heretofore allowed.

(d) Respondent erred in failing to allow as a deduction additional attorneys' fees in the sum of \$15,000.00, for attorneys' services, employed by the executors in the matter of protesting the determination of respondent in relation to the federal estate tax, the preparation of the within petition and the prosecution of this Appeal, over and above the fees heretofore allowed.

(e) Respondent erred in failing to allow as a deduction Items 4 to 8 inclusive, and Item 10,

under Schedule K of Form 706, and under Debts of Decedent on Page 5 of Exhibit "A" hereto attached.

(f) Respondent erred in determining a federal estate tax on the estate of said decedent in excess of the sum of \$95,320.00. [4]

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) That among the assets of decedent's estate, as disclosed in said Form 706, under Item 37 of Schedule B thereof, were 425.817 shares of the common stock of A. Hamburger & Sons, Inc., a California corporation; that petitioners inadvertently returned said stock at \$418,735.66 or \$983.134 per share. That said respondent determined a value of \$510,980.40 on said shares of stock or \$1,202.16 per share, as indicated by said Exhibit "A" hereto attached. That the value determined by the respondent is excessive and is not the fair market value of said stock at the basic date. That in truth and in fact the fair market value of the said 425.817 shares of stock on the basic date was not in excess of \$212,908.50 or \$500.00 per share.

(b) That among the assets of decedent's estate, as disclosed in said Form 706, under Item 38 of Schedule B thereof, were 104.167 shares of the common stock of Hamburger Realty Company, a California corporation; that petitioners returned said stock at \$220,162.16 or \$2,113.55 per share. That said respondent de-

terminated a value of \$505,209.95 on said shares of stock or \$4,895.97 per share, as indicated by said Exhibit "A" hereto attached. That the value determined by the respondent is excessive and is not the fair market value of said stock at the basic date. That the fair market value of said stock on the basic date is the sum of \$220,-162.16 or \$2,113.55 per share.

(c) That petitioners have incurred, which are unpaid, for services of the Executors of the estate of said decedent, and subjected themselves to liability for additional executors' fees in relation to matters of the estate, and particularly in relation [5] to the protesting and concluding the determination of the federal estate tax presented by this petition, in an additional sum of \$10,000.00.

(d) That petitioners have subjected themselves to the liability for attorneys fees, over and above attorneys' fees heretofore paid or allowed, in the sum of \$15,000.00, in relation to the determination of the federal estate tax, the preparation of this petition and the prosecution to final determination of the above entitled matter.

(e) That respondent failed to allow as deductions under "Debts of Decedent", Items 4 to 8 inclusive, and Item 10, under Schedule K, of Form 706, which debts were paid by your petitioners; that said debts were contractual liabilities of decedent which were unpaid at the time of her death and were therefore liabilities

of her estate under the California law. That said debts were allowed to petitioners as charges against said estate in their accounting and Order of the Court.

(f) That petitioners were in error in returning a value on the stock of A. Hamburger & Sons, Inc., in Form 706 in excess of the sum of \$212,908.50, and petitioners claim refund of the returned tax in the sum of \$51,229.95, with interest thereon as provided by law.

Wherefore, petitioners pray that this Honorable Court may hear this proceeding and reverse the action of the respondent claimed of herein and order a refund of the federal estate tax erroneously overpaid in the sum of \$51,229.95, together with interest thereon as provided by law, and order a redetermination of the proposed deficiency.

/s/ CLAUD I. PARKER,

and

/s/ RALPH W. SMITH.

Of Counsel:

/s/ L. A. LUCE. [6]

State of California,
County of Los Angeles—ss.

P. L. Nathan and Evelyn Hamburger, each being first duly sworn, upon their oath, depose and say:

That they are the duly appointed, qualified and acting Executors of the Estate of Belle Alice Hamburger Nathan, deceased, and are the petitioners

named in the foregoing petition; that they have read the foregoing petition or had the same read to them, and are familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief and those facts they believe to be true.

/s/ P. L. NATHAN,

/s/ EVELYN HAMBURGER.

Subscribed and sworn to before me this 3rd day of February, 1944.

/s/ PEARL ANDERSON,

Notary Public in and for the County of Los Angeles, State of California. [7]

EXHIBIT "A"

Form 1279

Copy

SN-IT-7

Office of Internal Revenue, Agent in Charge Los Angeles Division, LA:ET:90D:NAB, Treasury Department, Internal Revenue Service, 417 South Hill Street, Los Angeles 13, California.

Dec. 27, 1943

Estate of Belle Alice Hamburger Nathan,
P. L. Nathan et al., Executors,
505 South Windsor Boulevard,
Los Angeles, California.

Gentlemen:

You are advised that the determination of the estate tax liability of the above-named estate, dis-

closes a deficiency of \$103,177.16 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA: Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

ROBERT E. HANNEGAN,

Commissioner,

By /s/ R. B. SULLIVAN,

Acting Internal Revenue

Agent in Charge.

NAB:vmc

Enclosures:

Statement

Form of Waiver. [8]

LA:ET:90D:NAB. District of Sixth California.
 Estate of Belle Alice Hamburger Nathan. Date
 of death: October 13, 1940.

Statement

	Liability	Assessed	Deficiency
Estate tax	\$249,724.21	\$146,547.05	\$103,177.16

In making this determination of the Federal estate tax liability of the above named estate, careful consideration has been given to the report of examination dated October 21, 1942, to the protest dated December 23, 1942, and to the statements made at the conferences held on February 9, 1943, March 30, 1943 and November 4, 1943.

A copy of this letter and statement has been mailed to your representative, Ralph W. Smith, 808 Bank of America Building, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Net Estate

Net estate for basic tax as disclosed by return	\$ 708,606.56
Additions to value of net estate and decreases in deductions:	
Stocks and bonds	\$379,788.27
Other miscellaneous prop- erty	2,411.10
Executors' commission.....	6,000.00
Miscellaneous administration expenses	4,028.17
Debts of decedent	1,001.86
	<hr/>
	393,229.40
	<hr/>
	\$1,101,835.96
Reductions in value of net estate and increases in deductions:	
Attorney's fees	8,000
	<hr/>
Net estate for basic tax as adjusted.....	\$1,093,835.96
Net estate for additional tax as adjusted.....	\$1,153,835.96

Explanation of Adjustments

Stocks and bonds:		Return	Determined
Item 1	\$	2,152.50 }	\$ 2,230.63 }
Accrued interest		20.16 }	16.03 }
Item 2		563.12 }	557.66 }
Accrued interest		5.04 }	4.51 }
Item 3		225.34 }	223.06 }
Interest		2.02 }	1.80 }
Item 4		56.31 }	55.76 }
Interest50 }	.45 }
Item 5		542.60 }	540.63 }
Interest		1.46 }	.97 }
Item 6		2,170.40 }	2,162.50 }
Interest		5.84 }	3.89 }
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Item 11		10,000.00 }	10,000.00 }
Interest		None }	65.00 }
Item 12		52,890.00 }	52,890.00 }
Interest		54.00 }	603.47 }
Item 13		10,578.00 }	10,578.00 }
Interest		10.80 }	160.69 }
Item 14		900.96 }	892.25 }
Interest		8.08 }	7.21 }
Item 15		35,400.00 }	35,400.00 }
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Item 16		35,400.00 }	35,400.00 }
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Item 17		23,600.00 }	23,600.00 }
Interest		33.20 }	420.28 }
Item 18		1,126.25 }	1,115.31 }
Interest		10.00 }	9.01 }
Item 19		563.12 }	557.66 }
Interest		5.04 }	4.51 }

Stocks and bonds :		Return	Determined
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Interest		3.03 }	2.90 }
Item 21		542.60 }	540.63 }
Interest		1.46 }	.97 }
Item 22		2,170.40 }	2,162.50 }
Interest		5.84 }	3.89 }
Item 23		22,443.60 }	22,456.25 }
Interest		70.00 }	46.67 }
Item 24		1,085.20 }	1,081.25 }
Interest		2.92 }	1.94 }
Item 25		1,077.80 }	1,080.00 }
Interest		9.17 }	8.19 }
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Interest		57.29 }	102.43 }
Item 37		418,735.66	510,980.40
Item 38		220,162.16	505,209.95
Totals		\$884,889.84	\$1,264,678.11
Increase			\$ 379,788.27

The adjustments with respect to items one to thirty-six inclusive are based on the mean between the high and low sales of the New York Stock Exchange. [11]

The value of 425.817 shares of capital stock of A. Hamburger & Sons has been determined as \$510,980.46 in lieu of \$418,735.66 returned.

The value of 104.167 shares of capital stock of Hamburger Realty Co. has been determined at \$505,209.95 in lieu of \$220,162.16 returned.

Other miscellaneous property:

	Return	Determined
Item 3	\$24,957.12	\$27,265.02
Items 324 to 415 inc.....	437.55	426.75
Costume jewelry	0.00	25.00
1935 tax refund	0.00	89.00
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	\$25,394.67	\$27,805.77
Increase		\$ 2,411.10
Executor's commission	\$15,000.00	\$ 9,000.00
Miscellaneous administration expenses:		
Item 2	\$ 42.97	None
Item 3	281.39	220.41
Item 4	1,320.56	1,034.92
Item 5	1,115.95	874.12
Item 6	3.85	None
Item 8	70.00	None
Item 9	70.00	None
Item 10	66.07	None
Item 11	65.12	None
Item 12	15.12	None
Item 13	70.00	None
Item 21	1,115.95	None
Item 22	1,320.56	None
Item 23	600.08	None
	<hr/>	<hr/>
Totals	\$ 6,157.62	\$ 2,129.45
Decrease		\$ 4,028.17

Items 2, 6, 8 to 13 incl., and 21 to 23 incl., covering interest, insurance, taxes, etc., are disallowed inas-much as the same are for periods beginning subse-quent to date of the decedent's death.

Items 3 to 5 inclusive, covering interest items, are recommended for allowance in amounts which had accrued to date of the decedent's death.

Debts of Decedent:

	Return	Determined
Item 4	\$ 26.54	None
Item 5	20.00	None
Item 6	30.39	None
Item 7	30.00	None
Item 8	32.00	None
Item 10	27.10	None
Item 24	23,186.64	\$22,350.81
	<hr/>	<hr/>
Totals	\$23,352.67	\$22,350.81
Decrease		\$ 1,001.86

Items 4 to 8 inclusive and 10, under "Debts of decedent", cover debts which are not proper deduc-tions under the provisions of the Federal estate tax law, decedent having left a husband surviving her with a solvent estate, who, under the law of California, was liable for the same.

Item 24 is allowed in amount of annuity, or pres-ent worth value, computed in accordance with Column 2, Table A, Page 30, Estate Tax Regulation as follows:

$208.331\frac{1}{3} \times 12 \times 8.78052 \times 1.01820$ or \$22,350.81

Attorney's fees	\$22,000.00	\$30,000.00
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Computation of Estate Tax

	Return	Determined
Gross estate for		
basic tax	\$1,122,437.32	\$1,504,636.69
Deductions	413,830.76	410,800.73
	<hr/>	<hr/>
Net estate for		
basic tax	\$ 708,606.56	\$1,093,835.96
Net estate for		
additional tax \$	768,606.56	\$1,153,835.96
Gross basic tax		\$ 56,006.88
Credit for estate and inher- itance taxes		44,805.50
		<hr/>
Net basic tax		\$ 11,201.38
Total gross taxes (basic and additional)	\$ 271,827.51	
Gross basic tax	56,006.88	
	<hr/>	
Net additional tax		215,820.63
		<hr/>
Total net basic and additional taxes.....		\$227,022.01
Defense tax		22,702.20
		<hr/>
Total tax payable		\$249,724.21
Tax assessed:		
Original, Jan. 1942 List, page 103, line 6....		146,547.05
		<hr/>
Deficiency		\$103,177.16

Filed Feb. 9, 1944.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are federal estate taxes; denies the remaining allegations contained in paragraph 3 of the petition.

4. (a) to (f), inclusive. Denies the allegations of error contained in subparagraphs (a) to (f), inclusive, of paragraph 4 of the petition. [15]

5. (a). Admits that among the assets of decedent's estate, as disclosed in said Form 706, under Item 37 of Schedule B thereof, were 425.817 shares of the common stock of A. Hamburger & Sons, Inc., a California corporation; that petitioners returned said stock at \$418,735.66. Admits that the respondent determined a value of \$510,980.40 on said shares of stock, as set forth in the notice of deficiency; denies the remaining allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) Admits that among the assets of decedent's estate, as disclosed in Form 706 under Item 38 of Schedule B thereof, were 104.167 shares of common stock of Hamburger Realty Company, a California corporation; that petitioners returned said stock at \$220,162.16. Admits that the respondent determined a value of \$505,209.95 on said shares of stock, as set forth in the notice of deficiency. Denies the remainder of the allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) and (d). Denies the allegations contained in subparagraphs (c) and (d) of paragraph 5 of the petition.

(e) Admits that the respondent did not allow as deductions under "Debts of Decedent", Items 4 to 8, inclusive, and Item 10, under Schedule K, of Form 706; denies the remaining allegations contained in subparagraph (e) of paragraph 5 of the petition. [16]

(f) Denies the allegations contained in subparagraph (f) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL, HDT
Chief Counsel,
Bureau of Internal
Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
HAROLD D. THOMAS,
E. A. TONJES,
Special Attorneys,
Bureau of Internal Revenue.

Received and filed March 28, 1944. [17]

[Title of Tax Court and Cause.]

AMENDED PETITION TO CONFORM
TO PROOF

The above named petitioners hereby file their amended petition to conform to proof, after leave first had and obtained in the above entitled Court, hereby petitioning for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency LA:ET:90D:NAB, dated Dec. 27, 1943, and as a basis for their proceedings allege as follows:

1. That your petitioners are the duly appointed, qualified and acting Executors of the Estate of Belle Alice Hamburger Nathan, deceased, having been so appointed by the Superior Court of the State of California, in and for the County of Los Angeles; their address for mail in this proceeding being 808 Bank of America Building, 650 South Spring Street, Los Angeles 14, California.

2. The notice of deficiency (a copy of which is attached hereto marked Exhibit A) was mailed to petitioners on Dec. 27, 1943.

3. The taxes in controversy are deficiency federal estate taxes in the amount of \$103,177.16, and in addition thereto the sum of [18] \$76,853.19, being overpayment of federal estate taxes on Form 706, or a total controversial tax of \$180,030.35.

4. The determination of said tax set forth in

said notice of deficiency is based upon the following errors:

(a) Respondent erred in determining a value in excess of \$127,745.10 on the 425.817 shares of stock of the A. Hamburger & Sons, Inc., a California corporation, described under Item 37 of Schedule B of Form 706, and under Item 37 on Page 3 of Exhibit A hereto attached.

(b) Respondent erred in determining a value in excess of \$135,417.10 on the 104.167 shares of stock of the Hamburger Realty Company, a California corporation, described under Item 38 of Schedule B of Form 706, and under Item 38 on Page 3 of Exhibit A hereto attached, and erred in failing to accept as the market value thereof the said sum of \$135,417.10 as returned.

(c) Respondent erred in failing to allow as a deduction additional compensation for the Executors, in relation to the administration of the estate and the handling of death tax matters and the prosecution of this appeal a sum over and above the fees heretofore allowed, which said sum will be submitted and is allowable upon recomputation under Rule 50.

(d) Respondent erred in failing to allow as a deduction additional attorneys' fees for services of attorneys employed by the Executors in the matter of protesting the determination of respondent in relation to the federal estate tax,

the preparation of the within petition, and the prosecution of this appeal, a sum over and above the fees heretofore allowed, which said sum will be submitted and is allowable on re-computation under Rule 50. [19]

(e) Respondent erred in failing to allow as a deduction Items 4 to 8, inclusive, and Item 10, under Schedule K of Form 706, and under Debts of Decedent on Page 5 of Exhibit A hereto attached.

(f) Respondent erred in determining a federal estate tax on the estate of said decedent in excess of the sum of \$69,693.86.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) That among the assets of decedent's estate, as disclosed in said Form 706, under Item 37 of Schedule B thereof, were 425.817 shares of the common stock of A. Hamburger & Sons, Inc., a California corporation; that petitioners inadvertently returned said stock at \$418,735.66 or \$1127.00 per share. That said respondent determined a value of \$510,980.40 on said shares of stock or \$1202.16 per share, as indicated by said Exhibit A hereto attached. That the value determined by the respondent is excessive and is not the fair market value of said stock at the basic date. That in truth and in fact the fair market value of the said 425.817 shares of stock on the basic date was not in excess of \$127,745.10, or \$300.00 per share.

(b) That among the assets of decedent's estate, as disclosed in said Form 706, under Item 38 of Schedule B thereof, were 104.167 shares of the common stock of Hamburger Realty Company, a California corporation; that petitioners inadvertently returned said stock at \$220,162.16, or \$2113.55 per share. That said respondent determined a value of \$505,209.95 on said shares of stock, or \$4895.97 per share, as indicated by said Exhibit A hereto attached. That the value determined by the respondent is excessive and is not the fair market value of said stock at the basic date. That the fair market value of said stock on the basic date is the sum of \$135,417.10, [20] or \$1300.00 per share.

(c) That petitioners have incurred, which are unpaid, for services of the Executors of the estate of said decedent, and subjected themselves to liability for additional Executors' fees in relation to matters of the estate, and particularly in relation to protesting and concluding the determination of the federal estate tax presented by this amended petition, in an additional sum to be submitted and allowed upon recomputation under Rule 50.

(d) That petitioners have subjected themselves to the liability for attorneys' fees over and above attorneys' fees heretofore paid or allowed, in relation to the determination of the federal estate tax, the preparation of this petition, and the prosecution to final determination

of the above entitled matter, in an additional sum to be submitted and allowed upon recomputation under Rule 50.

(e) That respondent failed to allow as deductions under "Debts of Decedent", Items 4 to 8, inclusive, and Item 10, under Schedule K of Form 706, which debts were paid by your petitioners; that said debts were contractual liabilities of decedent which were unpaid at the time of her death and were, therefore, liabilities of her estate under the California law. That said debts were allowed to petitioners as charges against said estate in their accounting and Order of the Court.

(f) That petitioners were in error in returning a value on the stock of A. Hamburger & Sons, Inc., in Form 706 in excess of \$127,745.10, and petitioners were in error in returning a value on the stock of Hamburger Realty Company on Form 706 in excess of the sum of \$135,417.10; and petitioners claim refund of the returned [21] tax in the sum of \$76,853.19, with interest thereon as provided by law, all of which said amount was paid by your petitioners within a period of three years prior to the date of the issuance of the statutory notice of deficiency, being Exhibit A attached hereto, and within three years prior to the filing of the within petition herein.

Wherefore, petitioners pray that this Honorable Court may hear this proceeding and reverse the action of the respondent complained of herein and order a refund of the federal estate tax erroneously overpaid in the sum of \$76,853.19, together with interest thereon as provided by law, and order a re-determination of the proposed deficiency.

/s/ CLAUDE I. PARKER,

/s/ RALPH W. SMITH,

/s/ J. EVERETT BLUM,

Counsel for Petitioners.

Of Counsel:

/s/ L. A. LUCE. [22]

State of California,

County of Los Angeles—ss.

P. L. Nathan and Evelyn Hamburger, each being first duly sworn, upon their oath, depose and say:

That they are the duly appointed, qualified, and acting Executors of the Estate of Belle Alice Hamburger Nathan, deceased, and are the petitioners named in the foregoing Amended Petition; that they have read the foregoing Amended Petition or had the same read to them, and are familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to

be upon information and belief and those facts they believe to be true.

/s/ P. L. NATHAN,

/s/ EVELYN HAMBURGER.

Subscribed and sworn to before me this 4th day of October, 1945.

/s/ PEARL ANDERSON,

Notary Public in and for the County of Los Angeles,
State of California. [23]

EXHIBIT "A"

Form 1279

SN-IT-7

Office of Internal Revenue, Agent in Charge Los Angeles Division, LA:ET:90D:NAB, Treasury Department, Internal Revenue Service, 417 South Hill Street, Los Angeles 13, California.

Dec. 27, 1943

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Respectfully,

ROBERT E. HANNEGAN,

Commissioner,

By /s/ R. B. SULLIVAN,

Acting Internal Revenue

NAB:vmc

Agent in Charge.

Enclosures:

Statement

Form of Waiver. [24]

LA:ET:90D:NAB. District of Sixth California.
Estate of Belle Alice Hamburger Nathan. Date
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Item 23	600.08	None
	<hr/>	<hr/>
Totals	\$ 6,157.62	\$ 2,129.45
Decrease		\$ 4,028.17

Items 2, 6, 8 to 13 incl., and 21 to 23 incl., covering interest, insurance, taxes, etc., are disallowed inasmuch as the same are for periods beginning subsequent to date of the decedent's death.

Items 3 to 5 inclusive, covering interest items, are recommended for allowance in amounts which had accrued to date of the decedent's death.

Debts of Decedent:

	Return	Determined
Item 4	\$ 26.54	None
Item 5	20.00	None
Item 6	30.39	None
Item 7	30.00	None
Item 8	32.00	None
Item 10	27.10	None
Item 24	23,186.64	\$22,350.81
Totals	\$23,352.67	\$22,350.81
Decrease		\$ 1,001.86

Items 4 to 8 inclusive and 10, under "Debts of decedent", cover debts which are not proper deductions under the provisions of the Federal estate tax law, decedent having left a husband surviving her with a solvent estate, who, under the law of California, was liable for the same.

Item 24 is allowed in amount of annuity, or present worth value, computed in accordance with Column 2, Table A, Page 30, Estate Tax Regulations as follows:

$$208.331\frac{1}{3} \times 12 \times 8.78052 \times 1.01820 \text{ or } \$22,350.81$$

Attorneys' fees	\$22,000.00	\$30,000.00
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Computation of Estate Tax

	Return	Determined	
Gross estate for			
basic tax	\$1,122,437.32	\$1,504,636.69	
Deductions	413,830.76	410,800.73	
	<hr/>	<hr/>	
Net estate for			
basic tax	\$ 708,606.56	\$1,093,835.96	
Net estate for			
additional tax \$	768,606.56	\$1,153,835.96	
Gross basic tax		\$ 56,006.88	
Credit for estate and inheri-			
tance taxes		44,805.50	
		<hr/>	
Net basic tax			\$ 11,201.38
Total gross taxes (basic and			
additional)		\$ 271,827.51	
Gross basic tax		56,006.88	
		<hr/>	
Net additional tax			215,820.63
			<hr/>
Total net basic and additional taxes.....			\$227,022.01
Defense tax			22,702.20
			<hr/>
Total tax payable			\$249,724.21
Tax assessed:			
Original, Jan. 1942 List, page 103, line 6....			146,547.05
			<hr/>
Deficiency			\$103,177.16

Filed Oct. 5, 1945.

[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

The Commissioner of Internal Revenue, by its attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the amended petition.

3. Admits that the taxes in controversy are Federal estate taxes; denies the remaining allegations contained in paragraph 3 of the amended petition.

4. (a) to (f), inclusive. Denies the allegations of error contained in subparagraphs (a) to (f), inclusive, of paragraph 4 of the amended petition.

5(a). Admits that among the assets of decedent's estate, as disclosed in said Form 706, under Item 37 of Schedule B thereof, [31] were 425.817 shares of the common stock of A. Hamburger & Sons, Inc., a California corporation; that petitioners returned said stock at \$418,735.66. Admits that the respondent determined a value of \$510,980.40 on said shares of stock, as set forth in the notice of deficiency; denies the remaining allegations contained in subparagraph (a) of paragraph 5 of the amended petition.

(b) Admits that among the assets of decedent's estate, as disclosed in Form 706 under Item 38 of Schedule B thereof, were 104.167 shares of common stock of Hamburger Realty Company, a California corporation; that petitioners returned said stock at \$220,162.16. Admits that the respondent determined a value of \$505,209.95 on said shares of stock, as set forth in the notice of deficiency. Denies the remainder of the allegations contained in subparagraph (b) of paragraph 5 of the amended petition.

(c) and (d). Denies the allegations contained in

subparagraphs (c) and (d) of paragraph 5 of the amended petition.

(e) Admits that the respondent did not allow as deductions under "Debts of Decedent", Items 4 to 6, inclusive, and Item 10, under Schedule K, of Form 706; denies the remaining allegations contained in subparagraph (c) of paragraph 5 of the amended petition.

(f) Denies the allegations contained in subparagraph (f) of paragraph 5 of the amended petition.

6. Denies each and every allegation contained in the amended petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL, ECC
Chief Counsel,

Bureau of Internal
Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,

E. A. TONJES,
Special Attorneys,

Bureau of Internal Revenue.

Filed Oct. 16, 1945. [33]

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT
AND OPINION

Harlan, Judge:

Petitioners are the duly appointed, qualified and acting executors of the estate of Belle Alice Hamburger Nathan, Deceased, said estate being administered in the Superior Court of the State of California in and for the County of Los Angeles. Their mailing address is 808 Bank of America Building, 650 South Spring Street, Los Angeles 14, California.

This proceeding is brought to redetermine a deficiency in Federal estate tax in the amount of \$103,-177.16 and to procure a judgment for \$76,853.19 as alleged overpayment of Federal estate tax.

The question presented requires a decision as to the fair market value of the capital stock of the Hamburger Realty Company and the capital stock of A. Hamburger & Sons, Inc., as of October 13, 1941. [34]

FINDINGS OF FACT

Belle Alice Hamburger Nathan died on October 13, 1940.

Her executors elected to have the assets of her estate valued on the optional date of October 13, 1941.

The petitioners filed a Federal estate tax return on Form 706 with the collector of internal revenue, sixth district of California, and paid the tax provided therein.

Among the assets owned by the decedent at her death were 425.817 shares of the common stock of A. Hamburger & Sons, Inc., and 104.167 shares of the common stock of Hamburger Realty Company.

The petitioners returned the value of decedent's shares in A. Hamburger & Sons, Inc., at \$983.35 per share. The respondent, in his notice of deficiency, valued said shares at \$1200 per share. The petitioners returned the value of the shares of the Hamburger Realty Company at \$2,113.55 per share. The respondent, in his deficiency notice, valued said shares at \$4,850 per share. At the oral hearing the respondent announced that the testimony would not sustain the valuations set forth in the deficiency notice but would sustain a valuation of \$4,000 per share for the Hamburger Realty Company stock. However, in his brief the respondent contends for a valuation of \$3,900 per share for the Hamburger Realty Company stock and \$1,000 per share for the A. Hamburger & Sons, Inc., stock.

Petitioners filed an amended petition in which they claimed the Hamburger Realty Company stock was worth \$1,300 per share and the A. Hamburger & Sons, Inc., stock was worth but \$300 per share and, on this amended valuation, asked for a judgment for overpayment of taxes.

A. Hamburger & Sons, Inc., a California corporation, had issued and outstanding 3,774.183 shares of common stock of a par value of \$1,000 each. [35]

The Hamburger Realty Company, a California corporation had issued and outstanding 1,000 shares of common stock of \$1,000 par value. Neither of these companies had any stock of any other character than the common stock referred to and had issued no bonds.

The stock of the Hamburger Realty Company on the basic date was owned as follows:

- 104.167 shares by petitioners herein;
- 104.167 shares by Evelyn Hamburger;
- 104.167 shares by Jennie H. Marx, or by a trust created by her;
- 291.666 shares by David A. Hamburger Corporation;
- 291.666 shares by David A. Hamburger as Trustee of the Estate of M. A. Hamburger, deceased;
- 104.167 shares by A. Hamburger & Sons, Inc.

The stock of A. Hamburger & Sons, Inc., on the basic date was owned as follows:

- 425.817 shares by petitioners herein;
- 425.817 shares by Evelyn Hamburger;
- 425.817 shares by Jennie H. Marx, or by a Trust created by her;
- 1,248.366 shares by David A. Hamburger Corporation;
- 1,248.366 shares by David A. Hamburger as Trustee of the Estate of M. A. Hamburger, deceased.

All of the parties named in the two paragraphs immediately preceding this paragraph are brothers and sisters.

No shares of stock of Hamburger Realty Company or of A. Hamburger & Sons, Inc. have ever been sold and each of said corporations is a closed family corporation.

On the basic date the president, general and executive manager of said corporations was David A. Hamburger, aged 84 years. The vice-president of said corporations on the basic date was Evelyn Hamburger, aged 72 years. The secretary-treasurer of said corporations was P. L. Nathan, aged 76 years. Jennie H. Marx was 81 years of age on the basic date.

Neither the articles of incorporation of A. Hamburger & Sons, Inc., nor of Hamburger Realty Company provide for cumulative voting of the stock.

The assets, liabilities and net worth of the Hamburger Realty Co. on the basic date hereof and the book value (Col. A) and the fair market value (Col. B) thereof are as follows:

	Column A	Column B
	Book Value	Fair Market Value
Assets:		
A. Cash on hand \$10,720.74 and Accounts Receivable \$145.96 \$	10,866.70	\$ 10,866.70
B. Stocks:		
1. 275 shares Farmers & Merchants National Bank of Los Angeles, Calif.	71,234.00	106,700.00
2. 678 shares Security-First National Bank of Los Angeles, California	31,477.50	32,967.75

	Column A Book Value	Column B Fair Market Value
3. 140 units Security Company	None	4,340.00
4. 10 shares Wells Fargo Bank & Trust Co.....	1,885.00	2,925.00
5. 500 shares Angeles Hospital Association	350.00	350.00
6. 13 shares Retail Merchants Credit Ass'n.	1,285.00	1,285.00
C. Real Estate:		
1. W. 8th, Broadway & Hill Sts., property under lease to A. Hamburger & Sons, Inc. and May Co.	1,185,421.44	4,000,000.00
2. #845 South Broadway property	101,107.46	315,600.00
3. 36/144 interest S. W. Cor. 15th & Hill.....	19,164.78	3,000.00
4. 2/10th interest N. E. Cor. 14th Place & Hill	13,205.88	2,000.00
5. 6/30th interest S. E. Cor. 14th & Hill Sts.....	6,880.38	1,400.00
6. 1/2 interest N. E. Cor. 15th & Hill Sts.....	51,433.30	6,000.00
7. Vallejo, Solano County property	None	None
8. 1404 South Hill St.....	26,692.26	5,000.00
9. 149 W. 14th Place.....	39,937.31	6,000.00
10. 1318/22 South Hill St.	74,111.35	5,800.00
11. S. W. Cor. 15th & Hill Sts.	60,398.50	6,000.00
12. Temple Street property	10,589.35	3,500.00
13. 14th Place & S. Broadway	26,622.61	3,500.00
14. S. E. Cor. 10th & Main Streets	200,006.40	30,000.00
15. S. E. Cor. Ezra St. & Pico Blvd.	2,468.82	500.00
16. W. 15th btn. Hill & Olive Sts.	5,228.32	3,000.00

	Column A Book Value	Column B Fair Market Value
D. Office Furniture & Fixtures..	None	100.00
E. Prepaid taxes and insurance	6,547.82	6,547.80
F. Sales Contract—Leroy Joseph	250.00	250.00
	<hr/>	<hr/>
Total Assets	\$1,947,164.18	\$4,557,632.27
Liabilities:		
A. Accounts Payable	\$ 6,391.90	\$ 6,391.90
B. Federal income and excess profits taxes	70,116.03	70,116.03
C. Note due A. Hamburger & Sons, Inc.	548,220.70	548,220.70
D. Lease rental deposits from lessees	5,750.00	5,750.00
	<hr/>	<hr/>
Total Liabilities	\$ 630,478.63	\$ 630,478.63
Net Worth	\$1,316,685.45	\$3,927,153.64
	<hr/> <hr/>	<hr/> <hr/>

The profit and loss statements of Hamburger Realty Company for the years beginning 1936 to and including the year 1943 are as follows:

Year			
1936	Receipts	\$282,839.06	
	Expenses	85,805.39	
		<hr/>	
		197,033.67	
	Federal Income Tax.....	27,936.41	\$169,097.26
		<hr/>	
1937	Receipts	\$285,569.43	
	Expenses	80,345.72	
		<hr/>	
		205,223.71	
	Federal Income Tax.....	28,709.47	\$176,514.24
		<hr/>	
1938	Receipts	\$291,041.44	
	Expenses	82,874.28	
		<hr/>	
		208,167.16	
	Federal Income Tax.....	33,629.85	\$174,537.31

Year			
1939	Receipts	\$293,643.30	
	Expenses	80,615.30	
		<hr/> 213,028.00	
	Federal Income Tax.....	34,694.30	\$178,333.70
1940	Receipts	\$272,540.06	
	Expenses	77,613.33	
		<hr/> 194,926.73	
	Federal Income Tax.....	45,319.37	\$149,607.36
1941	Receipts	\$294,825.72	
	Expenses	73,272.94	
		<hr/> 221,552.78	
	Federal Income Tax.....	70,116.03	\$151,436.75
1942	Receipts	\$293,138.32	
	Expenses	73,447.84	
		<hr/> 219,690.48	
	Federal Income Tax.....	92,035.28	\$127,655.20
1943	Receipts	\$340,321.88	
	Expenses	93,711.28	
		<hr/> 246,610.60	
	Federal Income Tax.....	116,529.99	\$130,080.61

Dividends paid by Hamburger Realty Company for years beginning 1936 to and including the year 1943 are as follows:

Year		
1936—January 6		\$183,082.14
1937—January 7		171,769.75
1938—January 7		176,514.24
February 17		1,091.32
1939—February 7		174,537.31
December 13		9,571.18

1940—February 8	176,260.91
March 7	2,072.79
1941—January 15	149,607.36
1942—March 12	151,436.75
1943—March 15	129,160.76

The assets, liabilities, and net worth of the A. Hamburger & Sons, Inc., on the basic date hereof and the book value (Column A) and the fair market value (Column B) thereof are as follows:

	Column A	Column B
	Book Value	Fair Market Value
Assets:		
A. Cash on hand and in banks	\$113,706.56	\$113,706.56
B. U. S. Treasury Bonds & Certificates:		
1. \$141,500 P. V. Series		
1945-7 2¾%	139,139.06 }	152,245.15 }
Interest	1,134.95 }	302.67 }
2. \$100 P. V. Series		
1955-60 27/8%	98.50 }	111.41 }
Interest84 }	.22 }
3. \$122,000 P. V. Series		
1955-60 27/8%	120,633.84 }	135,915.63 }
Interest	730.73 }	272.79 }
4. \$126,150 P. V. Series		
1943-45 3¼%	124,272.81 }	133,324.78 }
Interest	854.15 }	2,027.10 }
5. \$84,100 P. V. Series		
1944-46 3¼%	82,841.87 }	89,776.75 }
Interest	569.43 }	1,351.40 }
6. \$100 P. V. Series		
1944-46 3¼%	100.00 }	106.75 }
Interest68 }	1.61 }
7. \$150,000 P. V. Series		
1947-52 4¼%	168,187.50 }	177,000.00 }
Interest	1,436.54 }	3,152.10 }
C. Notes Receivable of S. W.		
Levenson	1,500.00 }	1,500.00 }
Interest	11.25 }	None }

	Column A Book Value	Column B Fair Market Value
D. Mortgages & Trust Deeds:		
1. Estate of Bella A. H.		
Nathan	\$ 55,797.61 }	\$ 55,797.61 }
Interest	None }	None }
2. Armenian Gethsemane		
Church	3,000.00 }	3,000.00 }
Interest	52.50 }	20.00 }
E. Bonds:		
1. \$100,000 P. V. L. A.		
City High School Dis-		
trict 4¾% 3/1 and		
9/1	103,815.22 }	103,815.22 }
Interest	1,583.33 }	554.10 }
2. \$3,100 P. V. Calif.		
Country Club 7% 5/1		
and 11/1	3,050.00 }	3,050.00 }
Interest	None }	None }
F. Stocks:		
1. 20 shares American		
Tel. & Tel.	2,105.00	3,057.50
2. 1,167 shares Texas		
Corporation	35,933.88	47,409.38
3. 1,505 shares Union Oil		
Co. of Calif.	25,812.50	22,575.00
4. 400 shares Inglewood		
Park Cemetery	16,000.00	30,000.00
5. 1,000 shares Standard		
Oil Co. of Calif.	41,375.00	23,000.00
G. Real Estate:		
1. 955 S. Alvarado, Aca-		
cia Arms	44,798.22	30,000.00
2. 421 East 7th Street,		
Stadler Hotel	81,520.78	65,000.00
3. 5320 Olympic Blvd.,		
Meadowbrook Apts. ..	55,345.66	25,000.00
4. 3123-9 Sunset Blvd.,		
Westerly Terrace	33,175.20	17,500.00
5. 420 N. Coronado		
Street	20,644.63	15,000.00

G. Real Estate—(Continued) :	Column A	Column B
	Book Value	Fair Market Value
6. 440 N. Coronado Street	\$20,111.59	\$15,000.00
7. 2311 Nottingham Street	23,959.68	16,500.00
8. 1034-40 W. Temple Street	15,695.49	13,500.00
9. N. E. Cor. Santa Monica & Serrano.....	51,636.53	25,000.00
10. 21 Avenue 26, Venice, California	3,703.76	2,500.00
11. 4500/10 Santa Monica Blvd.	30,005.61	15,000.00
12. 901 Exposition Blvd.	30,902.37	27,500.00
13. 932 S. Mariposa Street	20,313.74	15,000.00
14. 2418/22 Brooklyn Street	20,655.87	18,750.00
15. S. E. Cor. 90th & Broadway	10,502.04	9,500.00
16. Cor. Jefferson & Grand, Warehouse	179,675.79	300,000.00
17. 2165/9 West Wash- ington St.	25,461.25	15,000.00
18. 423 S. Western Ave- nue	53,254.60	18,000.00
19. 5425 Santa Monica Blvd. Flomar Apts....	63,261.33	50,000.00
20. 1627 Ingraham St....	32,639.24	25,000.00
21. 3800 S. Vermont Ave- nue	52,443.06	43,500.00
22. 1245 W. 49th Street....	3,891.05	2,750.00
23. S. E. Cor. Clinton & Madison Streets	19,589.78	5,000.00
24. Lot 12 and part Lot 5, Sec. 18 Twp. 2, R. 2, W., Riverside County (8,059/10,000ths In- terest)	1,227.29	500.00
25. 8/30th interest 1402 S. Hill Street	15,099.43	1,850.00

G. Real Estate—(Continued):

	Column A Book Value	Column B Fair Market Value
26. 2/10th interest N. E. Cor. 14th Place and Hill St.	\$ 11,113.71	\$ 2,000.00
27. 5/144th interest S. W. Cor. 15th and Hill Sts.	3,022.72	425.00
28. 1/2 interest N. E. Cor. 15th & Hills Sts.....	48,318.71	6,000.00
29. 1235 S. Hill Street....	47,933.87	6,400.00
H. 104.167 shares Hamburger Realty Co.	382,525.73	406,251.30*

I. Due from affiliated corporations:

1. David A. Hamburger Corporation at 2% (1/1/38)	560,000.00	420,000.00
Interest	6,096.49	1,026.76
2. David A. Hamburger Corporation at 2% (12/13/39)	12,000.00	12,000.00
Interest	259.00	80.00
3. Hamburger Realty Co. 2% (12/31/40)	548,220.70	548,220.70
Interest	None	None
4. David A. Hamburger Corporation—open ac- count	161,299.29	161,299.29

J. Due from Officers and Stockholders:

1. Evelyn Hamburger \$74,052.60 & \$3,988.64	102,725.44	78,041.24
2. Estate of Belle A. H. Nathan \$49,520.89 and \$11,209.29	77,237.14	60,730.18
3. Jennie H. Marx— \$113,174.55	150,899.40	113,174.55
4. Estate of M. A. Ham- burger—\$409,186.14 ..	409,186.14	409,186.14
Interest	1,977.70	2,341.36

	Column A Book Value	Column B Fair Market Value
K. Open Accounts—Stockholders:		
1. Evelyn Hamburger....	\$94,972.06	\$94,972.06
2. Jennie H. Marx.....	94,502.53	94,502.53
3. Estate of M. A. Ham- burger	87,504.20	87,504.20
4. Estate of Belle A. H. Nathan	45,560.83	45,560.83
L. Prepaid taxes, prepaid in- surance and prepaid rent commissions	11,744.01	11,744.01
Total Assets	\$4,810,357.31	\$4,436,883.88
Liabilities:		
A. Current Liabilities	\$ 444,244.98	\$ 444,244.98
B. Federal Income and Excess Profits Taxes	96,489.07	96,489.07
C. Lease rental deposits from lessees	14,382.50	14,382.50
Total Liabilities	\$ 555,116.55	\$ 555,116.55
Net Worth	\$4,255,240.76	\$3,881,767.33

*This amount, by agreement, is inserted after a finding by the Court. In the original as submitted this amount was left vacant.

Under the terms of the lease between A. Hamburger & Sons, Inc. and The May Department Stores Co. dated March 30, 1923, A. Hamburger & Sons, Inc. was entitled to receive, during the period commencing November 1, 1941 and ended December 31, 1942, the sum of \$604,078.16 and during this same period A. Hamburger & Sons, Inc. was obligated to pay to the Hamburger Realty Co. as rental for the same property the sum of \$291,666.66. The

excess of the amount that A. Hamburger & Sons, Inc. was entitled to receive from The May Department Stores Company over and above the amount A. Hamburger & Sons was required to pay to the Hamburger Realty Co. during the period commencing November 1, 1941 and ended December 31, 1942, was \$312,411.49 which, when discounted at 6% (.9433) to the date of receipt, had a value at October 13, 1941 of \$294,697.77 and, when discounted at 7% to the date of receipt, had a value at October 13, 1941 of \$279,218.75. This sum is not, nor is any portion thereof, carried as an asset, and is not reflected in the above Balance Sheet.

The profit and loss statements of A. Hamburger & Sons, Inc. for the year beginning 1936 to and including the year 1943 are as follows:

Year			
1936	Receipts	\$397,685.74	
	Expenses	59,928.64	
		<hr/>	
		337,757.10	
	Federal Income Tax.....	41,360.14	\$296,396.96
		<hr/>	
1937	Receipts	\$445,422.81	
	Expenses	66,986.65	
		<hr/>	
		378,436.16	
	Federal Income Tax.....	44,051.15	\$334,385.01
		<hr/>	
1938	Receipts	\$416,682.57	
	Expenses	60,718.16	
		<hr/>	
		355,964.41	
	Federal Income Tax.....	50,694.87	\$305,269.54

Year			
1939	Receipts	\$416,551.04	
	Expenses	62,180.38	
		<hr/> 354,370.66	
	Federal Income Tax.....	50,511.86	\$303,858.80
1940	Receipts	\$406,941.05	
	Expenses	60,936.33	
		<hr/> 346,004.72	
	Federal Income Tax.....	71,493.34	\$274,511.38
1941	Receipts	\$410,128.89	
	Expenses	62,116.66	
		<hr/> 348,012.23	
	Federal Income Tax.....	96,489.07	\$251,523.16
1942	Receipts	\$417,465.74	
	Expenses	60,998.51	
		<hr/> 356,467.23	
	Federal Income Tax.....	135,911.53	\$220,555.70
1943	Receipts	\$154,476.52	
	Expenses	53,730.81	
		<hr/> 100,745.71	
	Federal Income Tax.....	26,108.48	\$ 74,637.23

Dividends paid by A. Hamburger & Sons, Inc. for years beginning 1936 to and including the year 1943 are as follows:

Year		
1936	March 24	\$295,912.43
1937	January 7	262,478.08
	January 27	50,734.00
	December 29	6,350.00
1938	January 7	276,997.91
	February 17	41,615.44

Year		
1939	February 7	\$305,269.54
1940	February 8	300,579.11
	March 7	3,946.97
1941	January 15	274,511.38
1942	March 12	251,523.16
1943	March 15	222,687.57

On the 30th day of March, 1923, there was in existence a lease from the Hamburger Realty Company to A. Hamburger & Sons, Inc., for the property situated at Broadway, Eighth, and Hill Streets, Los Angeles, California, which lease terminated on December 31, 1942, and which lease provided for an annual rental of \$250,000 payable by the said A. Hamburger & Sons, Inc. to Hamburger Realty Company.

On the 30th day of March, 1923, A. Hamburger & Sons, Inc., subleased the property situated at Broadway, Eighth and Hill Streets, Los Angeles, California, to The May Department Stores Company for a term of twenty years, terminating December 31, 1942, for a total rental of \$10,355,625.60 payable \$43,148.44 per month.

On the 30th day of March, 1923, Hamburger Realty Company leased the property situated at Broadway, Eighth and Hill Streets, Los Angeles, California, to The May Department Stores Company for a term of thirty years commencing January 1, 1943, and terminating December 31, 1972, for a total rental of \$9,000,000, payable \$25,000 per month beginning January 1, 1943.

The May Department Stores Company is a reputable department store organization in good stand-

ing and a purchaser or owner of the shares of stock here in issue would not have been unduly alarmed as to the receipt of the rentals provided for.

The leases referred to in the findings did not provide for the lessee carrying full coverage insurance against such hazards as fire, lightning, explosion, flood and water, earthquake, and other like hazards, for the protection of the lessors, and the cost of such full coverage insurance would have been \$10,487.38 for the first 45 years of said leases and \$20,395.78 for the last five years of said leases.

For several years prior to the basic date the said David A. Hamburger, president, general and executive manager of Hamburger Realty Company and A. Hamburger & Sons, Inc., had been ill and almost continuously confined to his bed.

On or about the basic date and for some time prior thereto P. L. Nathan, secretary-treasurer of Hamburger Realty Company and A. Hamburger & Sons, Inc., was and had been in poor physical condition and showing signs of senility.

Neither Evelyn Hamburger nor Jennie H. Marx prior to the basic date had any business experience.

The children of David A. Hamburger are Catherine F. Hamburger, Florence H. Becker, Arthur Hamburger, and Howard Hamburger.

None of the said children of David A. Hamburger has had any experience in business and, except possibly for one of the daughters, had never held any position in either Hamburger Realty Company or A. Hamburger & Sons, Inc.

The management on the basic date had not trained or attempted to train any younger people to take over the management or operation of either Hamburger Realty Company or A. Hamburger & Sons, Inc.

For many years prior to and subsequent to the basic date there was severe inharmonious relations existing between the stockholders and directors of Hamburger Realty Company and A. Hamburger & Sons, Inc.; David A. Hamburger did not speak to P. L. Nathan or Evelyn Hamburger or Jennie Marx and the latter three did not speak to David A. Hamburger; each of said persons had his or her own separate attorney advising him or her in connection with the affairs of said corporations.

The inharmonious relations referred to seriously affected adversely the formation of any business or financial or investment policy of either corporation, to the end that such policies remained in status quo and stagnated.

The shares of stock of each of said corporations on the basic date were not attractive to banks as security for a loan.

The stockholders regularly each year, pursuant to an agreement, anticipated the earnings of the A. Hamburger & Sons, Inc., for the year and borrowed all of the earnings during such current year, leaving no earnings in the business for corporate operations.

The stockholder members of the Hamburger family, by reason of being stockholders, had other advantages, such as borrowing money at a low rate

of interest and from sources through the corporation, whereas, they could not have borrowed it from other sources on the same collateral. This advantage would not necessarily [45] have been available to the purchaser of the minority interests in the corporations here involved.

The fair market value of the property located at Broadway, Eighth and Hill Streets, Los Angeles, California, and subject to the leases from Hamburger Realty Company to The May Department Stores Company was arrived at by giving effect to said lease and the lease rentals discounted on a seven per cent basis and adding the residual value of the said property.

On the basic date 131 shares of the common stock of A. Hamburger & Sons, Inc., owned by decedent herein at the time of her death, was pledged to said corporation to secure an indebtedness of \$85,817.14 owing by the decedent to said corporation and evidenced by two promissory notes, one in the amount of \$66,027.85 and one in the amount of \$19,789.29, said notes bearing date of January 1, 1938, and being renewal notes of earlier dated notes.

The fair market value of the 104.167 shares of common stock of the Hamburger Realty Company on October 13, 1941, was \$3,900 per share. The fair market value of the 425.817 shares of the common stock of A. Hamburger & Sons, Inc., on October 13, 1941, was \$1,000 per share.

The parties have agreed to compute by further negotiations the amount of additional compensation for the executors and attorneys.

OPINION

Petitioners contend that the value of the stocks of these two corporations must be determined by taking into account the earnings of the corporation, the dividends paid and payable, marketability of the stock, the net worth of the company, the condition of the management of the company, a comparison of these stocks with other similar securities, market trends, conditions and restrictions affecting said stocks, the position of minority interests in said corporation and other similar [46] facts. At the hearing they introduced the testimony of two experts who gave their opinions as to the value of these stocks after being presented with hypothetical questions in which all of the above factors were included. Petitioners rest their case largely on the opinion of these experts. They also take the position that the fair market value of the stocks in this case is controlled by the rule expounded by many decisions and set forth in Section 81.10 of Treasury Regulations 105:

The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell.

The respondent contends that when all of the peculiar facts in this case are considered, all elements which would ordinarily be weighed in arriving at the value of the stock, except the earnings of the corporation and the appraised value of their tangible assets, are of little use. In resolving these

two positions certain basic facts impress us as controlling. Both of these corporations are strictly family concerns. All of the stockholders on the basic date, October 13, 1941, were brothers and sisters. No stock of either corporation had ever been sold outside the family. 96½ per cent of the assets of the Hamburger Realty Company was real estate, and for some time prior to October 13, 1941, this corporation had been a dormant body whose operations consisted almost wholly of collecting rents and looking after the upkeep of improved and unimproved real estate. For many years past A. Hamburger & Sons, Inc., had been operating apparently on the basis of advancing the private economic welfare of its stockholders and officers rather than attempting to increase its own earning capacity. The balance sheet of this corporation shows that it had made 2 per cent loans to corporations in which members of the Hamburger family were interested, in the face amount of \$1,120,000. It had made loans secured either by mortgages or liens on stock to stockholders in the approximate amount of \$800,000. Some of the notes involved in these loans are [47] exhibits in this case and the final due date is 30 years after the date of the note. The repayment of the note is by installment payments and no interest at all is required, except on overdue installments. The balance sheet also shows "open accounts" to stockholders in the gross amount of \$384,000 and nothing is said about any interest on these accounts. Since no interest is charged on the loans secured by notes except in case of default it is not to be

presumed in the absence of testimony that any interest is charged on these open accounts. During the years 1940 and 1941 there were ample bonds on the market returning 4 per cent interest and extremely high security. In fact, the balance sheet of the A. Hamburger & Sons, Inc., shows that they had some of these securities in their portfolio and if these corporations had been normally interested in the production of dividends for their stockholders, rather than in advancing the private economic welfare of their stockholders, a return of 4 per cent on all of these various loans could easily have been obtained which would have added \$69,000 to the income of A. Hamburger & Sons, Inc., for the year 1941. Allowing for tax deductions, this would have approximated a dividend source of \$50,000 more than was actually received. Under these circumstances it is obvious that little help can be received from considering the dividends paid record of these corporations for the reason that their dividend paying system was entirely abnormal. Thus, we have two corporations with no record of stock sales, a method of business operation unlike any normal corporation, and a system of paying dividends to stockholders whereby the stockholders profited more from receiving the use of the assets of the corporation to their own individual profit than they would have profited by receiving normal dividends. Under such conditions we do not feel that any system of evaluating this stock which would apply to a normal corporation would be useful here. [48]

The difficulty of arriving at a valuation is shown by the fact that both the petitioner and the respondent in this case have contended for two different sets of valuations at different times in this proceeding. In addition to these four values the balance sheet of the A. Hamburger & Sons, Inc., gives us a fifth book value for the stock of the Hamburger Realty Company. Petitioner, in his brief, chides the respondent for not having produced a "willing buyer" who would purchase this stock at the price for which the respondent contends. It might well then be asked of the petitioners as to why they did not, out of the turmoil of the Hamburger relatives, produce at least one member of the family who would be a "willing seller" to sell his stock at the price contended for by petitioner. It would, of course, be unusual to find a stockholder such as those of the Hamburger Realty Company whose stock was held by A. Hamburger & Sons, Inc., at a book value of \$3,672.23 a share who would be willing to sell such stock at \$1,660.89, but if the stockholders of the Hamburger Realty Company in truth and fact believe what their experts and attorneys contend in this case they surely would consider such a sacrifice price a very advantageous sale.

The question in this case is not new. The Board of Tax Appeals in *Melville Hanscom*, 24 B. T. A. 173 at page 173, says, "The capital stock of the Eliot Realty Company was closely held by members of the decedent's family and no sales thereof were ever made to the public. Under such circumstances the value of the stock is determined on the basis of

the assets underlying the capital stock, and the earnings of the corporation.”

Since, in the case at bar, by agreement, the parties have placed the value of the building of the May Department Store, which constitutes 8/9ths of the assets of Hamburger Realty Co., at a fixed capitalization of the existing income and since the management of A. Hamburger & Sons, Inc., have intentionally created a falsely low income by enriching themselves and the other stockholders through interest-free [49] loans, it is held that the incomes of these companies have already received all of the consideration possible in arriving at the valuation of the stock and that for existing purposes the fair market value of the assets is the only remaining available factor that can be intelligently used in arriving at this valuation.

In the case of Estate of Henry E. Huntington, Deceased, 36 B. T. A. 698, the Board had before it a closely held corporation in which there was no record of open sales and it said, on page 714, “The fair market value on May 23, 1927, of the 1,000 outstanding shares of stock of the Huntington Co. was equivalent to the fair market value of its net assets, to wit, \$16,110,985.49 or \$16,110.98549 per share.”

In the case of Bank of California v. Commissioner, 133 Fed. (2d) 428, the court approved the findings of the Board of Tax Appeals in a case where the issue was the valuation for estate tax purposes of stock in a closely held corporation in which there had been no sales. On page 430 the

court says, "The Board found that at the time of decedent's death Oakburn stock (7,700 shares) had a fair market value equal to Oakburn's net worth."

On the basis of the above precedents we would be inclined to find a somewhat larger valuation than is contended for by the respondent. However, since the respondent asks for a valuation of \$3,900 a share for the stock of the A. Hamburger & Sons, Inc., and for a value of \$1,000 a share for the Hamburger Realty Company, we will approve that valuation.

In arriving at this determination we have weighed and accepted the preponderance of the evidence as we have seen it. We have not relied upon any presumption that the original determination of the Commissioner in his notice of deficiency was correct.

Decision will be entered under Rule 50.

Entered July 17, 1946.

[Seal] [50]

[Title of Tax Court and Cause.]

ORDER

Good cause appearing therefore it is

Ordered that the next to the last paragraph on page 17 of the memorandum findings of fact and opinion entered July 17, 1946, reading as follows:

"On the basis of the above precedents we would be inclined to find a somewhat larger valuation than is contended for by the respond-

ent. However, since the respondent asks for a valuation of \$3,900 a share for the stock of the A. Hamburger & Sons, Inc., and for a value of \$1,000 a share for the Hamburger Realty Company, we will approve that valuation."

be and the same is hereby stricken and that the following paragraph be substituted in lieu thereof:

On the basis of the above precedents we would be inclined to find a somewhat larger valuation than is contended for by the respondent. However, since the respondent asks for a valuation of \$3,900 a share for the stock of the Hamburger Realty Company and for a value of \$1,000 a share for the stock of A. Hamburger & Sons, Inc., we will approve that valuation.

Entered July 22, 1946.

[Seal] /s/ BYRON B. HARLAN,
Judge. [51]

[Title of Tax Court and Cause.]

MOTION FOR REHEARING

Come now the petitioners above named, by their attorneys of record, and move this Honorable Court for its order, ordering a rehearing of the above entitled proceedings. This motion is based upon the following grounds:

1. That the cases of *Estate of Henry E. Huntington, Deceased*, 36 B.T.A. 698, and *Bank of America v. Commissioner*, 133 Fed. (2d) 428, relied on as authority by the Honorable Judge

who rendered the Opinion in the above entitled matter for his conclusions, are not in point in the instant matter, as more fully appears in Petitioners' Points and Authorities attached to Petitioners' Motion for Review by the Full Court, concurrently filed herewith.

2. That although the Honorable Judge who rendered the Opinion in the above entitled matter states that all factors of valuation were considered, it appears affirmatively from the opinion that the said Honorable Judge based his conclusions as to the value of the shares of stock involved in the instant [52] matter solely on the value of the assets owned by the corporations.

3. That the opinion in the instant matter was rendered by a judge of the above entitled Court other than the Honorable Judge who presided at the trial of the above entitled matter.

4. That the Opinion rendered in the instant matter is contrary to this Honorable Court's opinions in an unbroken line of analagous cases.

5. That the Opinion rendered in the instant matter is contrary to law.

6. That the Opinion rendered in the instant matter is contrary to, and not supported by the evidence.

That this motion will be based on the opinion rendered in the above entitled matter, the stipulations of facts filed in the above entitled matter, the official report of proceedings filed in the above en-

titled matter, the briefs heretofore submitted in the above entitled matter, the amended petition to conform to proof filed in the above entitled matter, the points and authorities attached to petitioners' motion for review by the full Court.

Wherefore, petitioners pray that this motion be set down for hearing by the above entitled Court, that notice of hearing be given as provided by law and the rules of this Honorable Court, and that upon such hearing this Honorable Court shall order a rehearing of the above entitled proceedings, and upon such rehearing the opinion heretofore entered on July 17, 1946, be vacated and withdrawn [53] and a new Opinion made and entered.

Dated this 12th day of August, 1946.

/s/ CLAUDE I. PARKER,

/s/ RALPH W. SMITH,

/s/ J. EVERETT BLUM,

/s/ L. A. LUCE,

Counsel for Petitioners.

Filed Aug. 15, 1946.

[Endorsed]: Denied. [54]

[Title of Tax Court and Cause.]

MOTION FOR RECONSIDERATION

Come now the petitioners above named, by their attorneys of record, and move this Honorable Court for its order, ordering a reconsideration of the above entitled proceedings. This motion is based upon the following grounds:

1. That the cases of *Estate of Henry E. Huntington, Deceased*, 36 B.T.A. 698, and *Bank of America v. Commissioner*, 133 Fed. (2d) 428, relied on as authority by the Honorable Judge who rendered the Opinion in the above entitled matter for his conclusions, are not in point in the instant matter, as more fully appears in Petitioners' Points and Authorities attached to Petitioners' Motion for Review by the Full Court, concurrently filed herewith.

2. That although the Honorable Judge who rendered the Opinion in the above entitled matter states that all factors of valuation were considered, it appears affirmatively from the opinion that the said Honorable Judge based his conclusions as to the value of the shares of stock involved in the instant [55] matter solely on the value of the assets owned by the corporations.

3. That the opinion in the instant matter was rendered by a judge of the above entitled Court other than the Honorable Judge who presided at the trial of the above entitled matter.

4. That the Opinion rendered in the instant matter is contrary to this Honorable Court's opinions in an unbroken line of analagous cases.

5. That the Opinion rendered in the instant matter is contrary to law.

6. That the Opinion rendered in the instant matter is contrary to, and not supported by the evidence.

That this motion will be based on the opinion rendered in the above entitled matter, the stipulations of facts filed in the above entitled matter, the official report of proceedings filed in the above entitled matter, the briefs heretofore submitted in the above entitled matter, the amended petition to conform to proof filed in the above entitled matter, the points and authorities attached to petitioners' motion for review by the full Court.

Wherefore, petitioners pray that this motion be set down for hearing by the above entitled Court, that notice of hearing be given as provided by law and the rules of this Honorable Court, and that upon such hearing this Honorable Court shall order a rehearing and reconsideration of the above entitled proceedings, and upon such rehearing and reconsideration the opinion heretofore entered on July 17, 1946, be vacated and withdrawn [56] and a new Opinion made and entered.

Dated this 12th day of August, 1946.

/s/ CLAUDE I. PARKER,

/s/ RALPH W. SMITH,

/s/ J. EVERETT BLUM,

/s/ L. A. LUCE,

Counsel for Petitioners.

Filed Aug. 15, 1946.

[Endorsed]: Denied Aug. 19, 1946. [57]

[Title of Tax Court and Cause.]

MOTION FOR REVIEW BY THE FULL
COURT OF THE OPINION ENTERED IN
THE ABOVE ENTITLED MATTER ON
JULY 17, 1946.

Come now the petitioners above named, by their attorneys of record, and move this Honorable Court for its order, ordering a review by the full Court of the opinion heretofore entered in the above entitled matter on July 17, 1946. This motion is based upon the following grounds:

1. That the cases of *Estate of Henry E. Huntington, Deceased*, 36 B.T.A. 698, and *Bank of America v. Commissioner*, 133 Fed. (2d) 428, relied on as authority by the Honorable Judge who rendered the Opinion in the above entitled matter for his conclusions, are not in point in the instant matter, as more fully appears in Petitioners' Points and Authorities hereto attached.

2. That although the Honorable Judge who rendered the Opinion in the above entitled matter states that all factors of valuation were considered, it appears affirmatively from the opinion that the said Honorable Judge based his conclusions as to the value of the shares of stock involved in the instant [58] matter solely on the value of the assets owned by the corporation.

3. That the opinion in the instant matter was rendered by a judge of the above entitled Court other than the Honorable Judge who presided at the trial of the above entitled matter.

4. That the Opinion rendered in the instant matter is contrary to this Honorable Court's opinions in an unbroken line of analagous cases.

5. That the Opinion rendered in the instant matter is contrary to law.

6. That the Opinion rendered in the instant matter is contrary to, and not supported by, the evidence.

That this motion will be based on the opinion rendered in the above entitled matter, the stipulations of facts filed in the above entitled matter, the official report of proceedings filed in the above entitled matter, the briefs heretofore submitted in the above entitled matter, the amended petition to conform to proof filed in the above entitled matter, the points and authorities hereto attached and filed concurrently herewith, and the record heretofore made and filed in the above entitled matter, and this Motion.

Wherefore, petitioners pray that this motion be set down for hearing by the above entitled Court, that notice of hearing be given as provided by law and the rules of this Honorable Court, and that upon such hearing this Honorable Court shall order the [59] opinion heretofore entered on July 17, 1946, be reviewed by the full Court, and upon such

review be vacated and withdrawn and a new opinion made and entered.

Dated this 12th day of August, 1946.

Respectfully submitted,

/s/ CLAUDE I. PARKER,

/s/ RALPH W. SMITH,

/s/ J. EVERETT BLUM,

/s/ L. A. LUCE,

Counsel for Petitioners.

Filed Aug. 15, 1946.

[Endorsed]: Denied Aug. 20, 1946.

/s/ J. E. MURDOCK,

Acting Presiding Judge. [60]

The Tax Court of the United States
Washington

Docket No. 3992

ESTATE OF BELLE ALICE HAMBURGER
NATHAN, P. L. NATHAN, et al., Executors,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion, entered July 17, 1946, and

Order dated July 22, 1946, the respondent herein having on December 4, 1946, filed a computation of tax, and the petitioner having on December 23, 1946, filed an acquiescence in said computation, it is

Ordered and Decided: That there is a deficiency in estate tax in the amount of \$47,543.61.

[Seal] /s/ BYRON B. HARLAN,
Judge.

Entered Dec. 31, 1946. [61]

Before The Tax Court of the United States

Docket No. 3992

In the Matter of
ESTATE OF BELLE ALICE HAMBURGER
NATHAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Room 324, Post Office and Federal Building
Spring, Temple and Main Streets
Los Angeles, California
October 4, 1945, 9:30 a.m.
(Met Pursuant to Notice)

Before: Honorable Arthur J. Mellott, Judge.

Appearances:

Ralph W. Smith, Esq., 1010 Bank of America
Building, Los Angeles, California, and

J. Everett Blum, Esq., 810 South Spring Street, Los Angeles, California, appearing on behalf of Estate of Belle Alice Hamburger Nathan, Petitioner.

E. A. Tonjes, Esq. (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent. [64]

PROCEEDINGS

The Clerk: Docket No. 3992. Estate of Belle Alice Hamburger Nathan.

The Court: State your appearances, please, for the record, gentlemen.

Mr. Smith: Ralph W. Smith and J. Everett Blum.

The Court: For the respondent?

Mr. Tonjes: E. A. Tonjes.

The Court: You may state your case for the petitioner.

Mr. Smith: If your Honor please, I have a witness, Mr. Mitchell, who has an appointment at 10:15. I wanted to present facts not in dispute here. I wonder if I could call him out of order and then make my statement afterward, if that meets your pleasure.

The Court: Very well. You may do so.

Whereupon,

SHEPARD MITCHELL

called as a witness for and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

(Testimony of Shepard Mitchell.)

Direct Examination

The Clerk: Will you please state your name for the record?

The Witness: Shepard Mitchell.

Q. (By Mr. Smith): What is your profession?

A. Attorney.

Q. You are admitted to the State Bar of the State of California? A. Yes.

Q. What is your firm's name?

A. Mitchell, Silberberg and Knupp.

Q. How long have you been an attorney in California? A. Since 1907.

Q. During that time have you represented the Hamburger Realty Company and A. Hamburger & Sons, Inc., or any of the children or brothers or sisters?

A. Yes, I have represented Hamburger Realty, A. Hamburger & Sons, the D. A. Hamburger Company and David A. Hamburger and David A. Hamburger's family.

Q. Did you ever have any business relations relative to the M. A. Hamburger Estate or the M. A. Hamburger Trust?

A. Yes. D. A. Hamburger was the first trustee of that trust. My firm was attorneys for the trustee. I had a great deal to do with it.

Q. Over what period of years would you say that relationship existed?

A. Well, somewhere around '33, I think, Mose

(Testimony of Shepard Mitchell.)

Hamburger died. That carried until Dave Hamburger's death, when the successor trustees came on. I think it was about September, 1943. [66]

Q. You think David Hamburger deceased in 1943? A. September, I believe it was, 1943.

Q. He had over a long period of years or otherwise been president and managing director of the Hamburger Realty Company and A. Hamburger & Sons? A. That is right.

Q. What was the condition of his health in, say, about October, October 13, 1941?

Mr. Smith: October 13, 1941, is our basic date, if your Honor please.

The Witness: Well, his health, he was a permanent invalid at that time, bedridden. As a matter of fact, at that time the doctors were only giving him a month or two to live; he kept going.

Q. (By Mr. Smith): Prior to that, what had been his physical and mental condition?

A. He had been gradually failing. He had high blood pressure and diabetes and various things. heart trouble and things that go together.

You asked as to his mental condition. I could say he was sane, but he was very definitely senile. He was living in the past very much.

Mr. Tonjes: He was what?

Mr. Smith: Senile. [67]

Q. (By Mr. Smith): You have been acquainted, of course, over this same period of years with P. L. Nathan? A. Yes.

(Testimony of Shepard Mitchell.)

Q. He was the assistant manager?

A. He was the vice-president.

Q. Tell us about his physical condition and mental equipment about October, 1941.

A. Well, Mr. Nathan also was in bad physical condition at that time, but, nevertheless, he was coming down to the office. Dave Hamburger had ceased to come down to the office. We held the meetings; if we had to have a meeting of his family corporation we went out to his house.

Q. At those times would he be in bed?

A. Oh, yes. His operations were just a formality. We prepared the minutes and had everything ready, and he just sat there while the other two members of the family, on the board of directors, transacted the business.

Q. What is your recollection as to Mr. Nathan's activity in the business in 1940 and 1941?

A. Mr. Nathan at that time and at any other time, in connection with this company, has done practically nothing, in my opinion. He wasn't then very sturdy or strong.

He also, in my opinion, was showing signs of senility, getting to the point where he told things over and over and [68] over again. But he was in better condition than Dave was.

Q. What would you say as to the business abilities of the three ladies, sisters?

Mr. Tonjes: That is objected to, your Honor, as entirely too speculative.

Mr. Smith: If your Honor please, we think it

(Testimony of Shepard Mitchell.)

is important because the purchaser of the stock is going to look to the management and the future management.

The Court: I am not very well oriented here. I hardly know what I am trying.

Mr. Smith: May we let this question go in, subject to a motion to strike later on?

The Court: I think I will do that.

Mr. Smith: I will appreciate that.

Mr. Tonjes: May I state my position? This man hasn't shown he is qualified to judge any business ability. He states he is an attorney and has performed some of the duties an attorney would. I submit that wouldn't qualify him.

The Court: What is the question? Let's hear the question.

(The question was read.)

The Court: I suppose you mean by that their general mental capacity to carry on.

Mr. Smith: If they had business experience.

The Court: Business experience? [69]

Mr. Smith: Yes.

The Court: I will permit him to answer. The objection is overruled.

The Witness: Who are you referring to?

Q. (By Mr. Smith): Mrs. Marx, Evelyn Hamburger. A. The third sister is Mrs. Nathan.

Q. Mrs. Nathan is gone. I guess there are only two, two ladies, Mrs. Marx and Evelyn Hamburger. Those are two of the sisters.

(Testimony of Shepard Mitchell.)

A. Except Mrs. David Hamburger; we do have Dave who was on the board of directors.

Q. I will ask you about her. The three of them.

A. They were different. Mrs. D. A. Hamburger not only has no business ability, but will not—she has been brought up where her husband did everything, and at the present time and always she never has participated in business and doesn't. She does what she is told to do.

Mrs. Marx and Mrs. Evelyn Hamburger are to be gauged from a different standard. Prior to the time of the death of Dave they had no opportunity, if they had any business ability, to exercise it, because they were absolutely completely excluded from participation in the management of the company's businesses. Since that time they have come in where they have had to take some responsibility. I think Mrs. Marx, in my opinion, [70] is——

Q. You are testifying to a situation now that existed after October 13, 1941? A. Yes, I am.

Q. Confine your answer to conditions as of October 13, 1941, and prior thereto, as to the business experience, business activities and business judgment, if you know, as to any one of these three ladies.

A. I had no occasions when I would see their business judgment for the reason they were not transacting any business. As I say, up until many years later they were not and did not in any manner participate in the business. Mrs. Hamburger

(Testimony of Shepard Mitchell.)

didn't attempt to, she lived on the money she got from the corporation.

Q. The stockholders of D. A. Hamburger and Company, as of October 13, 1941, will you tell us who they were and what shares they held?

Mr. Tonjes: You mean D. A. Hamburger?

Mr. Smith: Did we stipulate to that? I mean D. A.

Mr. Tonjes: What is the relevancy of that, Mr. Smith?

Mr. Smith: Merely on the notes and on the question of who may come into control of the business, what the management might subsequently be.

Mr. Tonjes: We have no question of value of notes; [71] have we?

Mr. Smith: No. But our position is it is weak management, almost infirmed management. When the buyer buys a minority interest he is going to give consideration to the type of management that is going to look after his interests, if you theoretically sell the stocks in this law suit.

Mr. Tonjes: Will you restate your question, Mr. Smith?

Q. (By Mr. Smith): The stockholders and their respective stock holdings on the basic date in D. A. Hamburger Company.

Mr. Tonjes: I appreciate that. What is your question again? Have the reporter read it.

The Court: The last question was not complete. Maybe you had better rephrase the whole question.

Mr. Smith: Let me start over again.

(Testimony of Shepard Mitchell.)

Q. (By Mr. Smith): Mr. Mitchell, could you give us the names of the stockholders as of October 13, 1941, of the D. A. Hamburger Company and their respective stock ownership?

A. David A. Hamburger, 10,508 shares; Catherine F. Hamburger, 5,896 shares;—

Mr. Tonjes: In what corporation is this?

The Witness: David A. Hamburger. Florence H. Becker, 2,803 shares; Arthur Hamburger, 1,832 shares; Howard [72] Hamburger, 1,832 shares.

Q. (By Mr. Smith): Could you tell us something of the business experience or business judgment of the Hamburger children?

A. Are you relating that to a time?

Q. Yes. To October. That is, I assume that Florence, Arthur and Howard are children of David A. Hamburger.

A. And Catherine.

Q. And Catherine? A. That is right.

Q. As to October 13, 1941, their business experience.

A. At that time it had been nothing, excepting Arthur Hamburger had been in a mining venture of some kind or other. That was very disastrous and would be against his business ability. Since then he has been in nothing.

Q. Have any one of David Hamburger's children ever held positions in Hamburger Realty or David A. Hamburger & Sons?

A. Hamburger Realty or Hamburger & Sons?

Q. Yes.

(Testimony of Shepard Mitchell.)

A. I think the daughter occupied a directorship, yes.

Q. Any office as an officer of any kind?

A. I am not sure. I won't answer that without looking at the records.

Q. You have with you here the decree of final distribution? [73] A. Yes.

Q. Order of distribution in M. A. Hamburger Estate? A. Yes.

Q. You are familiar with the distribution of the stock indenture in that estate owned by him in the Hamburger Realty and A. Hamburger & Sons?

A. Well, I am familiar to a point. There are contingent gifts over. There are several trust provisions with respect to particularly Arthur Hamburger. Just a broad picture——

Q. Maybe I can simplify that. We have stipulated as to the number of shares in the M. A. Hamburger trust. You tell us the terms of the trust, who the trustees were on October 13, 1941.

Mr. Tonjes: Mr. Smith, I think you are in error we have stipulated to any of the terms in connection with any Hamburger trust.

Mr. Smith: We stipulated to the shares, the number of shares; we stipulated to that.

Mr. Tonjes: The number of shares?

Mr. Smith: In the M. A. Hamburger trust. I think so.

Mr. Tonjes: I see. All right.

Q. (By Mr. Smith): Will you answer the question?

(Testimony of Shepard Mitchell.)

A. M. A. Hamburger, as appears from the order and decree, left his property in trust. The first trustee was David A. [74] Hamburger. Then the date you refer to David A. Hamburger was then duly qualified and acting as that trustee.

The decree divided the trust estate into two trusts, I think it was Trust Fund A and Trust Fund B. Trust Fund A was 25 per cent of the residue. Trust Fund B was 75 per cent.

David A. Hamburger received a life estate in Trust Fund A. The three sisters received the remaining—received each a third of the income from Trust Fund B. On the death of Dave Hamburger, any of the sisters being alive, Trust Fund A merged into Trust Fund B so that the life estate that Dave Hamburger had then went over to the sisters.

So that if all three sisters were then alive they should have a third of the entire estate, a life estate. Then as each sister died the other surviving sisters acquired that life estate interest of the deceased.

Q. With respect to the date of the death, whether they pre-deceased him or not?

A. That is true. Dave Hamburger's life estate never enlarged by the death of any of the sisters. He got his 25 per cent of the estate out of Trust Fund A. When he died that was the end of it for him and his family. The remainder interests, after the death of the last survivor of Dave Hamburger and the three sisters went generally to Dave Hamburger's children and their issue.

It isn't in the form right straight through of a

(Testimony of Shepard Mitchell.)

remainder there. There are some superimposed trusts after that, but the beneficiaries are always in Dave Hamburger's family and never in the sisters' family.

Q. Under the trust indenture, did the full voting power of the stock in the Hamburger Realty and Hamburger & Sons vest in Dave Hamburger?

A. Yes. In saying that, I think I should make a qualification. There was no limitation or provisions with respect to the voting power of stock in the M. A. Hamburger estate, so, of course, the legal conclusion is the trustee votes. Nevertheless, in connection with the will contest of the M. A. Hamburger estate and a final settlement there were extensive agreements drawn up under which the——

Q. I will go into that in just a minute.

A. I just want to qualify my answer as to the voting stock.

Q. The trustee, though, under the trust was given very broad powers?

A. Oh, yes.

Q. Which, in your opinion as a lawyer, would include the full right, undiminished right to vote the stock?

A. I think so.

Q. You made reference to the fact they had litigation. Tell us about that. That would be in relation to Mose Hamburger estate? [76]

A. A will contest. The sisters contested the wills.

Q. Between the four children, Dave and the three sisters?

A. Yes.

Q. Just tell us about that, whether it was a

(Testimony of Shepard Mitchell.)

heated controversy or whether it was rather a friendly controversy.

A. It was very, very bitter and permanently breached the relations between the three sisters, on the one side, and Dave on the other, so that they never spoke if they could avoid it. They had nothing but bitter things to say against each other.

Q. Were the sisters in complete accord and friendly among themselves?

A. Yes. They formed a unit against Dave Hamburger from that time on.

Q. Were there agreements made subsequent to that time relative to the operation of the company in some way? A. Yes.

Q. What was the effect of those agreements and when were they made?

Mr. Tonjes: Were those agreements in writing?

The Witness: Yes.

Mr. Tonjes: I object to the question.

The Court: What year were they made?

The Witness: I would want to look at it. It was [77] made right at the termination of the will contest. The will contest was a non-suit and then following that there were a lot of problems to work out. The lawyers worked them out through these agreements of the respective subject matters, being largely control of the corporation and dividends.

Q. In relation to the completion of the agreements and working out the understanding, did all the parties have a single lawyer or how were they represented? A. No, no, no.

(Testimony of Shepard Mitchell.)

Q. They didn't agree on a single lawyer?

A. We represented Dave Hamburger and Mrs.—let's see, Evelyn Hamburger had James Bennett of Finlayson, Bennett & Morrow. I think Mrs. Marx had Dave Cannonbaum. I guess that is sufficient to answer your question. They were represented by——

Q. Was the Nathan family represented in that in any way with separate counsel; do you recall?

A. I think I would want to refresh my memory.

Q. Do you know whether Newlin & Ashburn represented the Nathan family?

A. Yes, Allen Ashburn took care of it personally.

Q. About how long a time did it consume for the parties to all get together on an agreement?

A. The negotiations were very extended. I might describe them as very brittle. They looked rather hopeless [78] most of the time.

Q. Over weeks or months?

A. I think months.

Q. Months? A. Yes.

Q. What was the relationship at the basic date here and prior thereto between D. A. Hamburger and Mr. Nathan. Mr. Nathan being the husband of the decedent.

Mr. Tonjes: Did you represent either of these persons?

The Witness: I represented Dave Hamburger, not Mr. Nathan.

Mr. Tonjes: Did you represent Mr. Hamburger in connection with deals with Mr. Nathan?

(Testimony of Shepard Mitchell.)

The Witness: Mr. Hamburger didn't make deals with Mr. Nathan. It was with Mrs. Nathan. I represented M. Hamburger and Dave Hamburger, my firm did, right straight through on these transactions.

Mr. Tonjes: In connection with transactions with Mr. or Mrs. Nathan?

The Witness: Yes.

Mr. Tonjes: Go ahead.

Q. (By Mr. Smith): Answer the question. What was the relationship between Dave Hamburger and P. L. Nathan? [79]

A. Are you referring now to the time before Mrs. Nathan's death?

Q. Yes. A. Terrifically bitter.

Q. Did that continue to October 13, 1941?

A. It continued to this date, as far as P. L. Nathan is concerned. Dave Hamburger is dead or it would continue to him.

Mr. Smith: That is all.

Cross Examination

By Mr. Tonjes:

Q. You say there were some agreements finally reduced to writing? A. Yes.

Q. Do you know where those agreements are?

A. Yes, I have some of them. I have copies of them in my office. As a matter of fact, they were largely reduced, included in the order and decree, also.

Q. What is the date of those agreements, if you know?

(Testimony of Shepard Mitchell.)

A. I can't tell you exactly. They were just about the time of this decree. Fourth day of October, 1935, is the decree. And as soon as we got the agreement worked out we went right up to court and got our decree worked out.

Q. Were the terms of the various agreements all incorporated in that decree? [80]

A. I don't know if they all were, but some of them were. Insofar as the M. A. Hamburger estate was involved they were. I think there are other terms that are not set forth here.

Mr. Tonjes: Might I ask, if your Honor please, the document described by the witness as a decree of the court be marked for identification?

The Court: It may be handed to the clerk, and marked for identification as Respondent's Exhibit A.

(The document referred to was marked as Respondent's Exhibit A, for identification.)

The Witness: Could I have the privilege of removing it for making a copy? That is my office copy.

Q. (By Mr. Tonjes): I don't know whether we will put in evidence. I want to have it marked so we can examine it and see.

A. If you need it I will get you a photostatic copy.

Q. Thank you, sir. You may want to make reference to it again in connection with questions I might ask.

(Testimony of Shepard Mitchell.)

Did that include the terms of a trust agreement that was entered into at or about that time?

A. There isn't any trust agreement. The terms of the trust——

Q. None in connection with that?

A. The M. A. Hamburger, the terms of the M. A. Hamburger trust were in the first instance, of course, in M. A. Hamburger's [81] will, which, in turn, were incorporated in the decree. So the terms of your trust of the M. A. Hamburger trust are in the decree.

Q. Thank you. Now, you made reference to the fact that you prepared the minutes. To what corporation did you have reference when you made that statement?

A. D. A. Hamburger Corporation.

Q. Did you ever prepare any minutes in connection with the Hamburger Realty Company or the A. Hamburger & Sons, Inc.?

A. Oh, yes, many times.

Q. You prepared those, too?

A. Not always. Very frequently they prepared them in their own offices. Mr. Nally or one of the girls there would do it. Sometimes they would send them up to me for approval, depending on what was involved in them. If they were technical or involved very frequently I would draw them. I have drawn many, many long minutes for those two companies.

Q. When did you have your discussion with them in that connection?

A. In what connection?

(Testimony of Shepard Mitchell.)

Q. In connection with the minutes you would prepare.

A. I was at that time considered as acting attorney for those two companies. I attended the board of directors' meetings. I attended practically all of them during those years, right straight through. The board would have me draw [82] the minutes.

Q. After a certain course of action was decided upon, you would record that in the minutes; is that correct?

A. Yes, in general. In practically all cases the course of action was decided upon before the meetings were held. And in many cases the minutes were even drawn beforehand.

Q. Could you state briefly, if you know, how the policies of the corporations were formulated and by whom?

A. Pretty much by the lawyers for the different parties.

Q. By the lawyers?

A. That is right. The clients wouldn't talk to each other. They couldn't get together. The lawyers would get together and work out a policy and each lawyer would try to go out and sell it to his individual client and get them to vote on it.

Q. They were all capable, experienced men, the attorneys? A. Oh, yes.

Q. Do you know in a general way what the nature of the business was during the year 1941?

A. Of any particular company?

(Testimony of Shepard Mitchell.)

Q. Of, first, the Hamburger Realty Company, we will say.

A. I think the Hamburger Realty Company wasn't doing any particular business. It was collecting rents.

Q. That is, they owned a lot of property and some stocks and bonds? [83]

A. No, they didn't own very much stocks and bonds. The chief asset of the Hamburger Realty was the property that is at Eighth and Broadway and Hill Streets, occupied by the May Company. The May Company has executed, as lessee, a long-term lease on that. Hamburger Realty is largely collecting rent. They owned a few other properties. There was not much action in regard to them.

Q. Could you describe briefly what managerial functions were required to carry out the functions of the corporation at that time?

A. Hamburger Realty?

Q. Yes.

A. I think there was very little managerial functioning required at that time in the Hamburger Realty.

Q. To the best of your knowledge you don't know of any sales or transactions, that is, sales of real property, or things of that sort?

A. In Hamburger Realty?

Q. Yes.

A. I don't offhand recall any that occurred. If there was it was just casual.

Q. Were you consulted or was there any discus-

(Testimony of Shepard Mitchell.)

sion as to whether any properties would be bought or sold to take up with your clients, in order to get together with the rest of the stockholders? [84]

A. In Hamburger Realty?

Q. Yes. A. I question if there was.

Q. You don't believe there were?

A. I doubt it. As I say, if there was it was casual.

Q. Would there have been any occasion to seek the advice of men familiar with the handling of real estate at or about that time?

A. In Hamburger Realty?

Q. Yes. A. I think not.

Q. Of course, they had to pay taxes. Do you know whether or not they employed tax counsel to prepare their tax returns? A. Yes.

Q. Do you know who it was?

A. Claude I. Parker's office were their auditors and tax counsel.

Q. Would you say they were a capable firm?

A. I have great respect for them.

Q. Do you know whether or not they had any employees? A. Claude I. Parker?

Q. No, the Hamburger Realty?

A. Yes, Hamburger Realty and A. Hamburger & Sons had joint employees. Mr. Nally had been there and they had two or three girls there. [85]

Q. What did they do, if you know?

A. Just clerical work, no administrative work of any kind.

Q. Do you know whether or not the trustees ac-

(Testimony of Shepard Mitchell.)

tually voted the stock in the Hamburger Realty Company?

A. D. A. Hamburger, as trustee of the Mose Hamburger estate, voted the trust in that stock.

Q. They did? A. Yes.

Q. I believe your testimony was they had the legal right, but I don't think you actually stated they actually voted it.

A. Oh, yes, it was voted.

Q. Would you say your answers which you have given me with respect to the Hamburger Realty Company would follow in the same course if I asked them in connection with A. Hamburger & Sons, Inc.? A. No, I would not.

Q. You would not? A. Far from it.

Q. Well then, tell me what managerial functions were required in the operation of the A. Hamburger & Sons, Inc.

A. I will tell you what in my opinion should have been required, but wasn't done.

Q. I don't want to know that. I want to know what was [86] actually done.

A. Just nothing, stagnated.

Q. Did they have any employees?

A. They had the same people that worked for Hamburger Realty, and Hamburger & Sons. In a clerical sort of way, yes, two or three people.

Q. I would gather their functions would be merely to see the rents were collected and properly deposited, and so forth; is that right?

(Testimony of Shepard Mitchell.)

A. Yes. And keep the books, do stenographic work and things like that.

Q. They didn't have any opportunity for the exercise of any business discretion, so to speak; did they? A. No.

Q. Do you know whether or not the A. Hamburger & Sons, Inc., bought or sold any property during the year 1941?

A. Well, they sold property from time to time. But in 1941 I couldn't tell you without checking the records.

Q. Do you recall whether or not you were ever called upon to discuss with the other attorneys representing the other stockholders whether or not any certain transactions would be advisable transactions or not?

A. Yes, there were numerous transactions occurred in that company I am sure in which the lawyers were consulted. There were transactions which the lawyers themselves started [87] and tried to get across with the company, and with their clients and the directors, and didn't get any place.

Q. What did they do in that connection?

A. Well, I have named about three things. I will start with the last one, if you choose; what the lawyers tried to do. It was somewhere around this time, for instance, that the lawyers considered it was highly advisable that the company should——

Q. I don't mean that, Mr. Mitchell. I mean what did you actually do in connection with trans-

(Testimony of Shepard Mitchell.)

actions which were actually under discussion and consideration?

A. Well, these were under consideration and discussion by the lawyers, and originated with the lawyers. They took it up with the directors and the directors considered it, and the thing died, the one I was telling you about.

Other transactions, every now and then someone would come in and want to buy a piece of real estate. He would see Mr. Nathan, for instance, in Mr. Nathan's office. Mr. Nathan would very frequently, I think usually as a matter of practice he called me and told me about it. Sometimes I checked it and sometimes I didn't. If I were given the go sign usually someone in my office would take over the details of handling the escrow and completing the deal.

Q. Do you know whether or not they consulted any persons experienced in buying and selling real estate to determine [88] whether or not it was a good transaction from the viewpoint of the corporation?

A. I believe that there was a real estate man here that Mr. Nathan knew, Mr. McGarry, I believe it was; I am not sure. Sometimes he would ask Mr. McGarry what he thought of it. As far as I know generally the answer is no.

Q. Would you, as a lawyer, approve that sort of procedure?

A. Do you mean as a means of selling property?

Q. Yes, as a method of arriving at whether or

(Testimony of Shepard Mitchell.)

not it was a good transaction or not, from the viewpoint of the corporation?

A. No, I didn't approve of it. I didn't like it. I protested it. I tried to change it.

Q. What was your approach? What would it have been? A. What would be my approach?

Q. Yes.

A. The approach about this time, which I tried to get, was to get a very competent, experienced organization handling liquidation of real property and managing real property to go down and make a survey of all the property, make a report and take the thing over. I got far enough that the directors consented that would be done, and it was done. But Nathan wouldn't have any part of it.

Q. Generally your duty was and you functioned as a [89] supervisor to protect the rights of your parties in interest; is that correct?

A. That is a fair statement, yes. Generally I was in that role, even though I was actually drawing papers for the company. I think I would primarily be viewed as a representative of the D .A. Hamburger interests.

Mr. Tonjes: I think that is all, Mr. Mitchell.

Redirect Examination

By Mr. Smith:

Q. Mr. Mitchell, at the board of directors meetings were the corporations represented by attorneys?

A. I think at practically all meetings the respective counsel of the directors were present. The meet-

(Testimony of Shepard Mitchell.)

ings were very formal. Everything was agreed to and worked out in advance by the lawyers.

Q. Would there be as many as three or four lawyers at the directors meetings?

A. That is right; four and five sometimes.

Q. Each of them representing probably one of the brothers or one of the sisters?

A. That is right.

Q. You have indicated that there was a difference in the management, or rather the management requirements between the Hamburger—with relation to the Hamburger Realty and A. Hamburger & Sons. [90]

A. That is true.

Q. Will you amplify that?

A. With respect to A. Hamburger & Sons I have told you the nature of the Hamburger Realty as being largely a rent collection corporation. A Hamburger & Sons is largely a property owning corporation. It owns apartment houses. It owns a big warehouse that is rented to the May Company down on Jefferson. It owns vacant properties out in different places. It also owns vacant property on Hill Street. Its management is the management of any big company that is in the business of handling quite a number of real properties, improved and unimproved, of very substantial value, both individually and in the aggregate.

Q. And loans, there were substantial loans?

A. Oh, yes. A lot of the properties they had were the result of foreclosures of loans.

(Testimony of Shepard Mitchell.)

Q. Were there any loans by the corporation to the stockholders?

A. Yes, I don't just know—that was a legal complication more than a business complication. That didn't call for business management particularly.

You asked about it. The various stockholders in the past, before Mose Hamburger died, had drawn—they call them drawing accounts. They withdrew large sums of money from the corporation and they accumulated large sums. Dave Hamburger, [91] who owned about a third interest in these corporations, had a drawing account accumulated of probably over \$600,000.00. And other relative—they weren't in proportion to the stock holdings at all. They took what they needed apparently.

When we came into it and made all this settlement we funded those things in the notes and pledged the stock of the company to secure it. Since that time the thing has been just a frozen transaction, no business management involved.

Q. At a very low interest rate?

A. I think it is 2 per cent.

Q. Was there any evidence of the management prior to October, 1941, grooming any younger people to take their places in the management and operation of the business?

A. Well, I will say no. The attempt to put in some nepotism by Dave Hamburger produced the split between them. Florence Hamburger married Fred Becker, a young lawyer, and brought him out here from Washington and wanted to give him a

(Testimony of Shepard Mitchell.)

soft job in the company and wanted to take away some of Nathan's salary to give it to Fred. That is where the fight began between those two men.

Mr. Smith: That is all.

Mr. Tonjes: That is all, Mr. Mitchell. Thank you.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record. [92]

Mr. Blum: May the witness be excused, your Honor?

The Court: Yes.

(Witness excused.)

Mr. Smith: Is your Honor ready for me to proceed with the opening statement?

The Court: You may proceed.

Mr. Smith: We appreciate your Honor permitting us to put the witness on out of order.

Opening Statement on Behalf of the Petitioner
By Mr. Smith

Mr. Smith: If the Court please, this is a Federal Estate tax case. The decedent Belle Nathan having died a resident of the County of Los Angeles, October 13, 1940. The executors, who were her husband, P. M. Nathan, and Evelyn Hamburger, elected to make the return in the option period. We therefore have our basic date of October 13, 1941.

We have stipulated to many of the underlying facts, facts particularly which will conserve the time of this Court, making it unnecessary to pro-

duce witnesses as to the value of the underlying assets. I feel certain it will facilitate the understanding of my opening statement if we could present in evidence now the stipulation of facts with the exhibits. May that be a joint offer, Mr. Tonjes?

Mr. Tonjes: Yes, Mr. Smith.

Mr. Smith: We will make it a joint offer, if you [93] please. We have here, if your Honor please, in accordance with the rules of the Board, a complete stipulation with all of the exhibits attached. We also have a stipulation without the exhibits. I think we had probably better offer them as two separate exhibits. What is your Honor's pleasure?

The Court: You have the stipulation in duplicate, as required, but you do not have the exhibits in duplicate?

Mr. Smith: That is true, your Honor.

The Court: Of course, the difficulty with that is in the event of an appeal you have to go to the trouble of having copies made of any exhibits that you wish sent up. Those exhibits are on file.

Mr. Smith: We want to conform with the Board's rules.

The Court: We permit you to not file duplicates of the exhibits. I am just telling you what the penalty is on it.

Mr. Smith: On the exhibits. We are not doing that on the stipulation.

The Court: The stipulation may be handed to the clerk and marked a part of the record in the case.

Mr. Smith: We will offer first the stipulation with all the exhibits attached.

The Court: And the copy. It all goes together.

Mr. Smith: And the copy of the stipulation, as No. 1. As I understand, the exhibits are in evidence as a part of the stipulation. [94]

The Court: That is right.

Mr. Smith: And taking the numbers to which the exhibit numbers—I don't want any confusion on that. The exhibit numbers are 1, 2 and 3. I wonder if it would help to make this Petitioner's Exhibit A—or the joint exhibit.

The Court: You have some nine exhibits attached, is that right?

Mr. Tonjes: That is the way I understand it, your Honor.

The Court: Nine exhibits?

Mr. Tonjes: Nine exhibits.

The Court: We will start numbering any exhibits that the petitioner chooses to offer, and the next exhibit may be marked as Petitioner's Exhibit No. 10. The respondent's exhibits will be lettered. That will help you keep your exhibits straight, I think, gentlemen.

Mr. Smith: If your Honor please, we have here for valuation two stocks, each representing approximately eleven per cent of the outstanding and issued stock of the Hamburger Realty Company and A. Hamburger & Sons, two California corporations, whose business was confined at its principal office in this county.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record. [95]

Mr. Smith: The par value of the stock was \$1000.00.

The Court: \$1000.00 par value each?

Mr. Smith: Each. For each company. As I have indicated, there were no sales. The stocks were unlisted. Apparently no transactions that would in any way reflect the value of either of these stocks. There was no preferred stock, or no bonds issued by either of the companies. We have a question merely of the value of the common stock.

The Court: That is really Issues A and B of your petition?

Mr. Smith: That is right, sir.

The Court: Now, what about the other issues? Are they being waived?

Mr. Smith: We waive Error (e). The other issue, as to Errors (c) and (d), executors' and attorneys' fees, we expect, I believe, a stipulation with the Government that that matter may be deferred until after the opinion of the court, and taken up under Rule 50, as to what those additional fees are regarding the services of the attorneys and executors.

The Court: There will be no additional evidence required on those?

Mr. Tonjes: I don't think so, your Honor. That will be a matter of rather easy determination, I would say.

The Court: So that the two issues we are really trying are the Issues A and B. [96]

Mr. Smith: The valuation of the two stocks.

The Court: And of the A. Hamburger & Sons, that is 425.817 shares; is that correct?

Mr. Smith: That is true.

The Court: And of the Hamburger Realty it is 104.167 shares?

Mr. Smith: That is right.

The Court: Very well. Thank you.

Mr. Smith: If your Honor please, the Commissioner in the 90-day letter, in the Exhibit A to our complaint, fixed a value on the Hamburger Realty stock at \$4,850.00.

The Court: Per share?

Mr. Smith: Per share. So your Honor will have the whole picture, our office did not come into this case until after the issuing of the 90-day letter. We were not attorneys nor did we represent the executors in the probate or in the relation to the determination of the California Inheritance tax. We had nothing to do with the preparation of the Federal estate tax, Form 706.

In the Form 706 the executors returned a value on the Hamburger Realty Company of \$2,113.55 per share. In our petition we did not challenge that value.

However, now since having the opportunity to confer with experts in preparing the case for trial, we find we were in error in accepting the Government's determination of [97] \$2,113.55 per share.

The Court: You mean as to what the executors report?

Mr. Smith: Excuse me. The executors' determination. Now, it is our opinion that the value of that stock is much lower. We ask leave, if we may, to amend our petition to conform to the proof, if that is agreeable with your Honor in that respect.

The Court: Is there any objection to amending the petition?

Mr. Tonjes: No objection, your Honor, provided the amendment is limited to the value of the stock of the two corporations, or the one corporation, rather.

Mr. Smith: Now, we will take up the other corporation.

The Court: Do you care to state at this juncture the substance of what your amendment will be, the value you expect to——

Mr. Smith: Well, it may be around about \$1300.00 a share.

The Court: Around \$1300.00 per share.

Mr. Smith: Of course, that is stated with some reservation, for us to give consideration to the cross examination of our witness.

The Court: Very well. Now, as to the other, the Hamburger Realty Company. [98]

Mr. Smith: Of A. Hamburger & Sons. The other was Hamburger Realty.

The Court: It was?

Mr. Smith: Yes. Those figures I gave you previously were for Hamburger Realty Company. In the A. Hamburger & Sons the 90-day statutory letter and statutory notice fixed a value of \$1,202.16. The executors returned a value in Form 706 of \$983.13. I might say that the return value was the value that

was at that time, of course, determined by the executors or their attorneys.

Our petition in this matter cites the return value as being in error, and we say that the fair market value, on the basic date, was \$500.00 per share. As a result we ask for a refund of \$51,229.95.

We also ask that the deficiency of \$103,177.16 be abated.

It is now, however, our opinion that the value set forth in our estimate of fair market value in the petition was high. We will ask that we be granted the privilege of amending our petition to conform with the proof in that regard, as to the A. Hamburger & Sons stock. We are of the opinion at this time that the value should be around about \$300.00 per share. We have leases involved in the Hamburger Realty Company upon which we will have expert testimony.

The Court: That, you mean as part of the assets?

Mr. Smith: Yes, one of the principal assets of the Hamburger Realty Company.

We also, as your Honor will notice, have stipulated in the Exhibits A and B to the fair market value. If your Honor will find the first two exhibits to the stipulation of facts—they are Exhibits 1—in relation to Hamburger Realty Company, your Honor will note we have stipulated to the fair market value of the assets on the basic date. It will be in Column B, in the amount of \$3,927,153.64. Therefore, no testimony will be presented as to the value of the underlying assets.

The Court: I presume it is covered here, but I don't have it in mind. What were the total number

of shares outstanding in the Hamburger Realty?

Mr. Smith: In the Hamburger Realty, there is 1000 shares, and in the A. Hamburger & Sons there was 3774.183.

Exhibit 4, if your Honor please, indicates that the stipulated value of the underlying assets of the A. Hamburger & Sons is \$3,475,516.03, with the two exceptions that this honorable court will be required to assert in that exhibit, the value fixed by it on the 104.167 shares of the Hamburger Realty Company, which is owned by the A. Hamburger & Sons.

Theories that will be advanced by the Petitioner are in a general way that income would be the attractive [100] feature which would induce a purchaser to buy the minority interest in these two companies, while we understand that the Government is taking the position that the value of the underlying assets and the balance sheet would be the principal attraction to this assumed purchaser. I think that is all.

Mr. Tonjes: I would like to ask one question, Mr. Smith. Did you state that the deficiency notice included the stock of A. Hamburger & Sons, Inc., at \$1200.00?

Mr. Smith: Deficiency notice? I think I did.

The Court: \$1202.16 is what I wrote down.

Mr. Tonjes: If your Honor please, I think there is an inaccuracy there. I think that it was included in the deficiency notice as an even \$1200.00 a share.

The Court: Even \$1200.00?

Mr. Smith: I guess that is right. There is also a little over plus in the Hamburger Realty. I remember. That would come down to forty-eight-fifty.

Mr. Tonjes: It was included in the deficiency notice at forty-eight-fifty.

Mr. Smith: That is right. I recall that. I appreciate that correction.

Opening Statement on Behalf of the Respondent
By Mr. Tonjes

Mr. Tonjes: If your Honor please, in view of Mr. Smith's statement there is hardly any need that I make any [101] lengthy statement. It would be in a large measure repetition.

The Respondent did include the stock of the Hamburger Realty Company in the determination of the decedent's estate at \$4850.00 a share. I will admit now that I don't believe that the testimony which will be adduced by the Petitioner and by the Respondent either justified that holding. I believe, however, that the evidence will show clearly that the stock is worth about \$4,000.00 a share. With that in mind——

The Court: Are you valuing it on the basis of the total value of the assets?

Mr. Tonjes: Oh, no, your Honor. I wanted to comment on the Petitioner's statement.

The Court: Pardon the interruption.

Mr. Tonjes: I expect that will be one of the elements which the witnesses produced by the Respondent will testify they considered. But I think all of the witnesses will state they took into consideration many of the other elements which the courts have decided time and again should be properly considered.

I think there might be some disagreement as to the weight to be attached to the various factors. And perhaps I can say that maybe the Respondent attaches a little more importance to the underlying asset value than the Petitioner does. [102]

A. Hamburger & Sons, in the deficiency notice, as I stated, that was included at \$1200.00 a share. I believe that the testimony and all of the evidence will show that the stock has a value of approximately \$1000.00 a share.

With respect to the additional claim, that is, the claim for additional fees for the executors and attorneys' fees, I think, your Honor, that that can be well disposed of under Rule 50 after the matter has been decided as to how much additional fees are to be paid. It would be very simple, I would say.

The Court: Very well.

Mr. Blum: I don't intend this to be any statement, your Honor. I think perhaps the testimony may be a little better understood by you if I recite some facts with respect to leases.

The Hamburger Realty Company entered into a lease many, many years ago with the A. Hamburger & Sons. In March, 1923, A. Hamburger & Sons subleased to the May Company Department Stores for a period of 20 years, which then extended with their unexpired terms with the lease they had with Hamburger Realty, so their lease to May Company terminated on December 31, 1942.

On the same date the Hamburger Realty Company entered into a lease with the May Company Department Stores for a term of 30 years, beginning Jan-

uary 1, 1943, to pick up [103] with the two combined leases, a period of 50 years in which the building, which is referred to by Mr. Mitchell on Eighth Street, Broadway and Hill Streets, in this city, was leased to the May Company for a period of 50 years.

Our basic date being October 13, 1941, we will have with respect to A. Hamburger & Sons, in computing the value of their stock, and insofar as the income factor is important, a prior 5-year earning period, or 6 or 7, whatever the court deems necessary to take. But we will, on that date, know that one year and two months after the basic date that the A. Hamburger & Sons will lose the rental from the May Company Department Stores by reason of the termination of its lease to the May Department Stores, and the termination of its lease from the Hamburger Realty. So that the Hamburger Realty lease will then pick up, as I say, from January 1, 1943, forward.

If your Honor please, the lease from Hamburger Realty to A. Hamburger & Sons on the face actually terminates some time in 1940, I believe. Isn't it?

Mr. Tonjes: May 1, 1940.

Mr. Blum: However, their lease to May Company extended on beyond that term and they actually collected the rental. For all purposes, in order not to confuse the record, we are treating the May Company lease to A. Hamburger & Sons as being co-extensive with the May Company lease to Hamburger Realty to December 31, 1942. [104]

Mr. Tonjes: I think that is correct.

The Court: We will suspend at this time for a brief recess.

(A short recess was taken.)

Whereupon,

JOHN B. MILLIKEN

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you please state your full name for the record?

The Witness: John B. Milliken.

Q. (By Mr. Smith): State your business or profession. A. Attorney.

Q. You are admitted to the State Bar of the State of California? A. I am, yes, sir.

Q. In your professional matters, have you represented at any time the Hamburger Realty Company or the A. Hamburger & Sons, or any of the Hamburger children?

A. I have been rather closely identified with Hamburger Realty Company and A. Hamburger & Sons since 1934, and have particularly represented Mrs. Evelyn Hamburger, who is now, [105] following the death of David A. Hamburger, president of both corporations.

Q. Do you know what the investment policy was of either of these corporations on or about October 13, 1941?

(Testimony of John B. Milliken.)

Mr. Tonjes: That is objected to, your Honor. The witness hasn't been qualified to state whether or not he is familiar with it. He hasn't stated he represented either corporation. He said he was closely identified——

The Court: Perhaps additional qualifying questions should be asked.

Q. (By Mr. Smith): Tell us what your relationship was.

A. It is the practice of both corporations——

Q. To qualify you a little more——

A. I have attended and do attend the regular meetings of the A. Hamburger & Sons and Hamburger Realty Corporation, it being the practice and the custom of each stockholder to have his individual attorney present at all of such annual meetings or stated meetings.

At those meetings the policies, financial and otherwise, of the various corporations, are presented for discussion. The attendance upon those meetings, plus the investigation which I have made for my client, who, in turn, has a stockholder's interest in the corporations, is the basis for my familiarity with the question about which you have asked me.

Q. Well now, tell us, please, if you know, about the investment policies at October 13, 1941, and prior thereto.

A. In my judgment there was no policy, but rather a status quo policy. That is to say, there was so much family bitterness between the various stock-

(Testimony of John B. Milliken.)

holders that what one side would propose the other would oppose, and vice versa, with the result that those corporations have in reality, in my judgment, stood still with respect to business operations or recurrent business transactions or matters of policy.

Q. Was the matter of disharmony and the bitter relationship between the parties generally known in financial circles in Los Angeles on or about the basic date?

A. Yes, it is very well known. In fact, it reached the point to where Mr. David A. Hamburger drew a gun upon Mr. Nathan, who was the directing head, and we had to go to the District Attorney's office to get a restraining order. I mean that is how far the bitterness has gone; and generally known.

Q. Do you know whether or the stocks, securities of either of these companies would be acceptable to the bank as security for a loan?

Mr. Tonjes: That is objected to, your Honor.

The Court: The objection is sustained.

Q. (By Mr. Smith): Do you know whether any effort was ever made at a bank—— [107]

A. I do.

Q. ——at about the basic period here to secure a loan? A. I do.

Q. Tell us what the results were.

A. I was requested to give information to the Farmers & Merchants National Bank of this city who had, in turn, made a loan to David A. Ham-

(Testimony of John B. Milliken.)

burger with respect to stock he owned in each of these corporations.

Q. What was the result?

A. The result was that only a nominal value could be obtained with respect to the loan, of what I thought represented the real value of the stock.

Q. Do you know something about the borrowing policy or the agreements in relation to borrowing or advancements by either of these companies or both of them to the stockholders?

A. Yes. The stockholders regularly each year, pursuant to an agreement, anticipate the earnings of the year and have, at the close of each year, borrowed all of the earnings of a particular current year.

Q. What effect does that have on the continuation of the business?

A. Well, it means nothing in the business because it takes every cent of earning out of the business.

Mr. Smith: I guess that is all. [108]

Cross-Examination

By Mr. Tonjes:

Q. What do you mean by business of the corporation, Mr. Milliken?

A. Well, for instance, A. Hamburger & Sons owns a variety of assets, including apartment houses, very valuable vacant property in the city, hotels and many rental properties. It has been impossible to move those one way or another, either to make advantageous sales within a territory, for instance, that

(Testimony of John B. Milliken.)

may be going down, to re-employ the money in another territory where there may be, in the best judgment of realty experts, an ascending value, with the result it is simply just stagnant, in my judgment.

Q. Do you know of any occasion where the corporation had under consideration a transaction and was unable to complete it because of lack of funds?

A. I know of none for the simple reason that you could never get the stockholders, because of the enmity with each other, to agree upon any policy for the investment of funds.

I do know many instances where sales have been proposed which I, upon my investigation as general attorney for the corporation, have recommended be consummated and they have not been consummated because of the enmity felt existing between the stockholders.

Q. The fact the corporation stockholders have made loans [109] from the corporation didn't, to the best of your knowledge, ever impair any transaction which was under consideration?

A. Yes.

Q. Will you tell me when that happened?

A. For example, I have always felt there is a very valuable lot on Broadway, which, in my judgment, should be improved to obtain its greatest facility and use. That is impossible because there are no funds available, except as you might borrow on other assets of the corporation, to make that improvement.

(Testimony of John B. Milliken.)

Q. And the corporation has the capacity to borrow from its other assets?

A. If it desired to encumber all its other assets.

Q. It wouldn't have had to encumber all its other assets; would it?

A. I think any bank in town——

Q. Will you answer the question?

A. In my judgment, yes.

Q. They would have to encumber all the assets?

A. In my judgment it would.

Q. How big an improvement did the corporation consider making on this lot?

A. A minimum of three and a maximum of 600 thousand.

Q. This is the A. Hamburger & Sons Corporation you are speaking of?

A. Yes, that is right. [110]

Mr. Tonjes: I think that is all.

Mr. Smith: That is all.

(Witness excused.)

Mr. Blum: I will call Mr. Sparks.

Whereupon,

LOUIS P. SPARKS

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

(Testimony of Louis P. Sparks.)

Direct Examination

The Clerk: Will you please state your full name for the record?

The Witness: Louis P. Sparks.

Q. (By Mr. Blum): What is your business or profession, Mr. Sparks?

A. Well, I am technically termed as an insurance counsellor. I am an adviser to insurance buyers.

Q. Have you had any connection in that capacity with the Hamburger Realty Company or A. Hamburger & Sons?

A. I have been for some time employed by them as their insurance adviser.

Q. Were you on or about October 13, 1941?

A. I am not positive exactly when my employment began.

Q. It has been over a period of years?

A. It has been over a period of years.

Q. Were you called upon to examine the lease from [111] Hamburger Realty Company to May Department Stores Company and the lease of A. Hamburger & Sons to May Department Stores Company with respect to the insurance features thereof?

A. I was.

Q. The leases just referred being Exhibits 7 and 8, for the record. In that examination what did you find with respect to the lessors; being the Ham-

(Testimony of Louis P. Sparks.)

burger Realty Company and the A. Hamburger & Sons, protection?

Mr. Tonjes: At what time?

Mr. Blum: During the term of the lease.

The Witness: Well, I found that the protection required by the lease was very limited in that it required principally fire insurance and riot and civil commotion insurance and a certain amount of public liability insurance only.

Q. (By Mr. Blum): Would the Hamburger Realty Company and the A. Hamburger & Sons Company, in order to protect themselves against such hazards as fire and lighting, windstorm, cyclone, explosion, earthquake, flood and water damage and such as that, have had to take out additional insurance?

A. They would because the lease limited its requirement to 70 per cent of the cash value of the building.

Q. For what type of insurance?

A. For fire insurance only.

Q. For fire protection? [112] A. Yes.

Q. Did you cause to be made an analyses of the cost of the various insurance which would protect the Hamburger Realty Company and A. Hamburger & Sons?

A. I made an analysis of the various coverages which Hamburger would be required to purchase on their own if they wished to fully protect their property.

(Testimony of Louis P. Sparks.)

Q. What was the cost per year of that coverage?

Mr. Tonjes: What year?

Mr. Blum: Of any year during the term of the lease.

Mr. Tonjes: Are you talking about the lease, Mr. Blum, from 1923 to 1942, or from 1942 to——

Mr. Blum: Both.

Q. (By Mr. Blum): Both of the leases have more or less the same provisions as to the insurance coverage?

A. Yes. They are practically identical, except the lease with the Hamburger Realty Company in the last five years is different; otherwise the terms are very much the same.

Q. So that the cost of the insurance with respect to A. Hamburger & Sons' lease to May Company, would be the same per year as the cost of Hamburger Realty Company's lease to May Company up to the last five years?

A. It would be the same, except for one thing, that insurance rates are not fixed; they change, depending upon [113] what year we choose.

Q. What was the cost of the insurance as you computed it?

A. I haven't that cost before me. I would have to refresh my memory.

Q. To refresh your memory I show you a letter and ask you if you wrote that letter or caused to have it prepared?

A. I caused to have it prepared, and I wrote it in rough copy.

(Testimony of Louis P. Sparks.)

Q. Does that give the cost to which I just referred? A. Yes.

Q. What are the costs per year?

A. The cost is \$10,487.38.

Q. Is that for the full term of both leases, or what period?

A. For the first 45 years of both leases, full 20 years of the first lease and 25 years for the second lease.

Q. What would be the cost of the last five years of the Hamburger Realty Company lease?

A. That would be \$20,395.78.

Q. The difference in those costs being made up principally in what item?

A. Principally in the earthquake item.

Q. The May Company Department Stores, according to the lease, did not have to carry the burden of any earthquake damage during the last five years of the Hamburger Realty [114] Company lease; is that correct?

A. That is my interpretation on it.

Mr. Blum: That is all.

Cross-Examination

By Mr. Tonjes:

Q. Let me ask you, in your conclusion, did you assign any value to fire and lighting insurance?

A. Well, the value I used was the net determined by an appraisal company.

Q. In arriving at your figure of \$10,487.38, I believe it was, did any of that total consist of protection against fire and lightning? A. Yes.

(Testimony of Louis P. Sparks.)

Q. Do you know whether or not the building was protected by fire and lightning insurance during the period of these leases?

A. It was protected up to 70 per cent of the value.

Q. Up to 70 per cent, you say? A. Yes.

Q. You assigned then a figure in dollars to take care of a full protection?

A. Well, what I assigned is in two figures. I assigned one to take care of the difference between the 70 per cent and 100 per cent of value, and another figure taking care of the difference between 100 per cent of value and the [115] replacement cost, which is the basis of insurance on a concrete building, if you want to be fully covered.

Q. Was the building insured against that type of damage during the time of these leases?

A. It was not.

Q. It was not?

A. No. You asked me a statement there. I might clarify that one statement, if you will permit me, on whether or not the building was insured up to 70 per cent. It was insured to a hundred per cent, the lessor paying the difference between the 70 and 100 per cent.

Q. You were furnished a copy of a letter to refresh your recollection. Appearing thereon is a figure under "kind of insurance," and under No. 1 it says \$255.30. Do you know whether the type of insurance covered by that figure was on the building during the time that the lease was in effect?

(Testimony of Louis P. Sparks.)

A. Let's see that letter again, so I can be sure. That is the portion that the Hamburger Realty Company and A. Hamburger & Sons paid of the total fire insurance to increase the coverage from 70 to 100 per cent. Does that answer your question?

Q. Yes. Is it customary for owners of buildings of that type to carry 100 per cent insurance?

A. It is if they wish to be fully protected, and most of them do. [116]

Q. What is your experience with regard to whether or not, as a matter of custom and practice in this vicinity, owners of buildings of that type take out insurance at 100 per cent of its value?

A. Well, I could only testify as to those particular buildings that I am an adviser on, if you wish me to name particular buildings. Is that it?

Q. Do you know what the custom and practice is generally? A. No, I don't.

Q. Do you know how this figure of 70 per cent was ascertained when the insurance was provided for in the lease?

A. It was ascertained by an appraisal.

Q. Was the building, during the period of these leases, protected by wind storm and cyclone insurance?

A. It may have been from time to time, according to the wishes of the lessee, but the lessor had nothing to do with it.

Q. To your knowledge, have you any idea of the amount of wind storm and cyclone damage caused in this area? A. No, I don't.

(Testimony of Louis P. Sparks.)

Q. Would you say it would be very slight?

A. Well, it would depend on whether you were in the midst of a particular storm. Overall is quite a considerable sum in total. [117]

Q. Would you say the type of building as we have here would be likely to suffer with storm and cyclone damage?

A. If we had a cyclone here it probably would suffer considerable damage.

Q. Is it your recollection that we have ever had a cyclone? A. Not to my knowledge.

Q. Not of the type that would do any damage to this building?

A. Any damage, that is a broad statement. Any wind storm can do damage to a building, it might blow the tower off.

Q. Your quoted price is for full insurance.

A. That is because——

Q. Isn't it? Yes or no.

A. Yes, that is right.

Q. Would you say there would be any reason, or any possibility of the building being completely demolished?

A. There is nothing that will completely demolish a building. It becomes a constructive total loss; the building must be wrecked or changed.

Q. I notice they have flood or water damage insurance. Is it customary for buildings of this sort to carry that type of insurance to the full amount of insurance? A. It depends.

(Testimony of Louis P. Sparks.)

Q. I am asking you the custom. Do they? [118]

A. Some of them do.

Q. Is it generally the custom?

A. It is customary with my clients.

Q. They insure their buildings to a hundred per cent of their value?

A. They insure their buildings to a hundred per cent of their value.

Q. For flood and water damage?

A. For flood and water damage. It is principally water damage we are after, not floods, you understand.

Q. What do you mean by water damage? Distinguish water damage from floods.

A. That is breakage of the large pipes and so forth in the store, and the breakage of tanks that may be on top, plumbing tanks, and so on and so forth, or the crashing of the tank through the building.

Q. Do you succeed in selling clients hundred per cent insurance on that proposition?

Mr. Blum: That is objected to as being incompetent, irrelevant and immaterial, as to what he succeeds in doing.

Q. (By Mr. Tonjes): Do you sell clients a hundred per cent protection against flood and water damage?

A. I don't sell insurance; I recommend it.

Q. There is another item on the schedule furnished to [119] you, Mr. Sparks, relating to war

(Testimony of Louis P. Sparks.)

damage insurance. That, of course, would terminate on the cessation of hostilities; wouldn't it?

A. That is right. If there were no other conditions that might warrant it.

Q. What do you mean by subsistence and settlement insurance?

A. That is where the seepage underneath the foundation or the ground underneath the foundation maybe fall and become soft and water seeps in the subterranean condition and the building settles.

Q. Does that often happen after the building has been standing for 20 years, we will say?

A. It occasionally happens; I won't say it often happens.

Q. Do you know if it is the custom and practice of owners of buildings of this type to insure against that sort of a hazard?

A. Your statement of custom and practice—it is only just occasionally a client wishes to be fully insured and has a subsistence and settlement risk.

Mr. Tonjes: I think that is all.

Mr. Blum: That is all.

(Witness excused.)

Mr. Blum: Mr. Eitner. [120]

Whereupon,

ADOLF K. EITNER

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

(Testimony of Adolf K. Eitner.)

Direct Examination

The Clerk: Will you please state your full name for the record?

The Witness: Adolf K. Eitner.

Q. (By Mr. Blum): What is your business or profession, Mr. Eitner? A. Investments.

Q. Will you tell us where you had your education? A. Yale University.

Q. What years were you there?

A. 1922 to '26.

Q. What was your major at Yale?

A. Economics and history, math.

Q. Upon your graduation from Yale, where did you go in the business?

A. I went into business in New York with the National City Company.

Q. In the investment portion of their business?

A. That is correct.

Q. How long were you with the National City Company? A. Until 1933. [121]

Q. What were your duties with the National City Company?

A. The duties were of a general nature, largely statistical work in analyzing securities, appraising them.

Q. Do you know the size of the National City Company?

A. I do not remember. It was fairly sizable.

Q. What is the nature of its business?

A. It was an underwriter and dealer in securities.

(Testimony of Adolf K. Eitner.)

Q. In the parlance of the investment business, would you say they had a large volume of business or a small volume?

A. They had a large volume of business, probably one of the largest in the country up to the time they expired.

Q. When you left the company, where did you go? A. I went with Blythe & Company.

Q. How long have you been with them?

A. Since 1933.

Q. Are you with them now?

A. I am with them now, yes.

Q. You have been with them continuously since 1933? A. That is correct.

Q. What were your duties with Blythe & Company?

A. At the present time I am sales manager there, and that covers a pretty much of a cross section of the statistical work, analytical work, analysis work; all the sort of things that go on in an investment house.

Q. Is the statistical and analytical work in connection [122] with the appraisal of securities?

A. That is correct.

Q. Your work with the statistical department of Blythe & Company and with the National City Company, were you called upon to appraise various securities? A. Yes.

Q. In that respect, were they securities which either of the companies were undertaking to underwrite? A. Yes.

(Testimony of Adolf K. Eitner.)

Q. In connection with your appraisal of securities, did that cover both listed and unlisted securities? A. It did.

Q. Did it cover as well securities of closed corporations? A. That is correct, yes.

Q. Is Blythe & Company a national investment house? A. Yes, it is.

Q. How many branches does it have in the United States, if you know?

A. Well, there are five major offices and quite a number of what you might term secondary offices. I think the total runs around 30 or thereabouts.

Q. How many offices does it have in California?

A. The two major offices in California are Los Angeles and San Francisco. [123]

Q. You are in which office?

A. In the Los Angeles office.

Q. In connection with your appraisal of securities and analysis of them, did you have both minority interests and major interests in the stock of the corporation?

A. Yes. I would say that almost all conceivable circumstances and conditions that surrounded a security have come up at one time or another in appraisal work where we are considering buying either a small or large block, either for public or private placement, or otherwise.

Q. Including the securities which would have to be especially placed in order to find a purchaser?

A. Yes.

Q. Now, Mr. Eitner, I believe you have been

(Testimony of Adolf K. Eitner.)

handed copies of the stipulation of facts in this case? A. Yes, sir.

Q. You have been handed copies of Exhibits 1 to 9, inclusive? A. That is correct.

Q. I show you the stipulation of facts with Exhibits 1 to 9, inclusive, and ask you if you will look at it and see if those are the same exhibits and stipulations you have a copy of.

A. These are the same.

Q. Assume, if you will, that Belle Alice Hamburger Nathan [124] died on October 13, 1940.

Assume further that the Executors of the Last Will and Testament of said decedent elected to have the assets of her estate valued on the optional date provided by law, to-wit, October 13, 1941.

Assume further that at the time of said decedent's death she was the owner of 104.167 shares of the capital stock of the Hamburger Realty Company and that her estate was the owner thereof on the basic date, to-wit, October 13, 1941.

Assume further that on said basic date there was issued and outstanding 1000 shares of the capital stock of Hamburger Realty Company, with a par value of \$1000.00 a share, which said shares were common stock and were owned as follows:

104.167 shares by Petitioners herein;

104.167 shares by Evelyn Hamburger;

104.167 shares by Jennie H. Marx, or by a trust created by her;

291.666 shares by David A. Hamburger Corporation;

(Testimony of Adolf K. Eitner.)

291.666 shares by David A. Hamburger as Trustee of the Estate of M. A. Hamburger, deceased; and

104.167 shares by A. Hamburger & Sons, Inc.

Assume further that on the basic date there was no other shares of stock, either common, preferred, or otherwise, and no bonds, of the Hamburger Realty Company outstanding.

Assume further that no sales were ever made of any shares of stock of the Hamburger Realty Company and that the [125] said Hamburger Realty Company is a closed family corporation.

Assume further that on the basic date the President, General and Executive Manager of said corporation was David A. Hamburger, aged 84 years; that the Vice-President of said corporation on said basic date was Evelyn Hamburger, aged 72 years, and that the Secretary-Treasurer of said corporation was P. L. Nathan, aged 76 years; that Jennie H. Marx, one of the stockholders of said corporation, was 81 years of age.

Assume further than for a period in excess of three years prior to the basic date the said David A. Hamburger had been ill and almost continuously confined to his bed.

Assume further that for many years prior to the basic date the said David A. Hamburger and the said P. L. Nathan did not speak to each other and that the said David A. Hamburger and the said Evelyn Hamburger and Jennie H. Marx were on

(Testimony of Adolf K. Eitner.)

inharmonious terms and that each of them, together with the decedent herein, had their own and separate attorneys advising them in connection with the affairs of said corporation.

Assume further that the brothers and sisters above mentioned have engaged in quite serious and severe litigation among and between themselves.

Assume further that upon the death of the said David A. Hamburger, Evelyn Hamburger, and Jennie H. Marx, the control of said corporation and the management thereof will pass into the hands of the children of David A. Hamburger, none of whom [126] ever had any business training or experience nor ever worked for or in said corporation. That neither the Articles of Incorporation nor the By-Laws of the said Hamburger Realty Company provide for cumulative voting of the stock.

Assume further that the assets of the Hamburger Realty Company, their book value, and their fair market value are as shown in Exhibit 1, heretofore introduced into evidence, which said Exhibit 1 is herewith shown to you.

Assume further that the liabilities of said Hamburger Realty Company are as shown on said Exhibit 1 and that the net worth of said company is as shown on said Exhibit 1 and that the fair market value of said net worth is \$3,927,153.64, or an asset value per share of \$3,927.15.

Assume further that the profit and loss statements of said Hamburger Realty Company for the years

(Testimony of Adolf K. Eitner.)

1936 to 1941, inclusive, are as shown on Exhibit 2, heretofore introduced into evidence.

Assume further that dividends declared and paid for the years 1936 to 1941, both inclusive, are as shown in Exhibit 3, heretofore introduced into evidence.

Exhibits 2 and 3 are herewith shown to you.

Assume further that on or about the 30th day of March, 1923, there was in existence a lease of the Hamburger Realty Company as lessor to A. Hamburger & Sons, Inc., as lessee, providing for a stipulated rental of \$250,000.00 per year. [127]

Assume further that on the said 30th day of March, 1923, A. Hamburger & Sons, Inc., entered into a lease with the May Department Stores Company, subleasing the property situated on Broadway, Eighth and Hill Streets in the City of Los Angeles, California, to the said The May Department Stores Company for a period of 20 years for a total rental of \$10,355,625.60, payable at the rate of \$43,148.44 per month. That on the basic date said lease had one and one-sixth years unexpired term.

Assume further that on the 30th day of March, 1923, the Hamburger Realty Company and the May Department Stores Company entered into a lease for the aforesaid premises, the term of which lease was to begin January 1, 1943, and continue for a period of 30 years at a total rental of \$9,000,000.00, payable \$25,000.00 per month.

Assume further that on December 31, 1942, the

(Testimony of Adolf K. Eitner.)

aforesaid lease from Hamburger Realty Company to A. Hamburger & Sons, Inc., and the aforesaid lease from A. Hamburger & Sons, Inc., to the May Department Stores Company, terminated.

Assume further that in accordance with the terms of the aforesaid leases, the cost to the Hamburger Realty Company in order to protect itself against the hazards of fire, lightning, windstorms, explosions, earthquakes, and other types of like hazards, and including the loss of rental income insurance would be the sum of \$10,487.38 until 1968 and \$20,-395.78 per [128] year from and after the year 1968, and in default of Hamburger Realty Company taking out such types of insurance at said cost, it would have to assume such hazards incident to the foregoing.

Assume further that the Hamburger Realty Company is a corporation organized and existing under the laws of the State of California, with its principal office and only place of business located in the County of Los Angeles, State of California.

Assuming all of the foregoing facts, do you have an opinion as to the value of the 104.167 shares of the capital stock of the Hamburger Realty Company on the basic date? A. I have.

Q. Before going to the value, you have had a copy of this question before?

A. Yes, I have had a copy of the question.

Q. What, in your opinion, is the value of the

(Testimony of Adolf K. Eitner.)

104.167 shares of the capital stock of the Hamburger Realty Company, on the basic date?

A. \$2,000.00 per share.

Q. \$2,000.00 per share. In arriving at that value, Mr. Eitner, did you take into account such factors as the assets, value of the stock?

A. Yes, I did. I think I took into consideration all of the factors that are represented in the financial statement [129] and earnings history, dividend history, general background.

Q. Lack of liquidity of the stock? A. Yes.

Q. Minority interests?

A. Minority interests.

Q. Family voting power? A. Yes.

Q. The inharmony of the management?

A. Yes.

Q. The age of the management? A. Yes.

Mr. Tonjes: Will you answer some of those questions? I don't hear the answer.

The Witness: I gave consideration to all of those factors he has enumerated.

Q. (By Mr. Blum): The type of underlying assets shown in the balance sheet? A. Yes.

Q. In arriving at the value, did you have in mind any particular type of purchaser that would be interested in the securities, whether it would be a purchaser that would want to buy the block or a purchaser that would want to buy a few shares?

A. I had in mind it would be a purchaser that wanted [130] to buy the block. The reason for that,

(Testimony of Adolf K. Eitner.)

I didn't think it was practical to place the stock in small amounts here and there. I doubt if it could have been done.

Q. In arriving at the value, did you take into consideration whether this would be an investment security or speculative security?

A. I considered it an investment security.

Q: What is your definition of a speculative security, as distinguished from an investment security?

A. In the case of an investment security, the buyer is buying for the income which he has in contemplation, without the object of any capital gain.

In the case of speculative securities the income factor may be present, but very often the capital gain factor is dominant.

Q. With respect to the sale of the 104.167 shares of the Hamburger Realty Company, would it be your opinion the market would be a limited market or an unlimited market?

A. It would be a very limited market.

Q. Do you have in mind, from your experience in the investment field, any such person or group of persons who would be interested in purchasing the 104.167 of the Hamburger Realty?

A. I think, as a group, the most logical purchasers might have been found in some of these fraternal organizations [131] or insurance companies which are located, to the greatest extent, throughout the middlewest.

(Testimony of Adolf K. Eitner.)

Q. Such institutions being either tax exempt or in a——

A. I don't know what their tax status would be.

Q. Is an investment or speculation in a family corporation, closed corporation deemed in investment circles to be a desirable type of investment or speculation, or undesirable?

Mr. Tonjes: Will you read the question?

(The question was read.)

The Witness: It is undesirable largely for the lack of marketability, which it has.

Q. (By Mr. Blum): What was the condition of the market generally on the basic date?

A. By condition of the market I assume you mean the return that an investor could find.

Q. That is correct.

A. From investment type securities?

Q. That is right.

A. It varied. I have made a few notes here of prices as they were around the date October 13, 1941, for some representative stocks. American Telephone and Telegraph showed a return on its dividends of 5.84 per cent; Pacific Gas and Electric, 8.35; Consolidated Edison, 10 per cent; International Harvester, 6 per cent; and Standard of California, 6.5 per cent. [132]

Chesapeake & Ohio, 9.75 per cent almost; Union Pacific, 8 per cent; Pennsylvania, 9 per cent; May Department Stores, which is interesting because

(Testimony of Adolf K. Eitner.)

they are on the list, was 5.61; Bullock's, another local store, was about 5.88, almost 6 per cent.

Q. Now, in your opinion, would the purchaser look with respect to purchasing the stock of the Hamburger Realty Company, the 104.167 shares we have involved here, as compared with purchasing or investing a like amount of money in one of the securities you have just referred to?

A. These securities that I have referred to have all the attributes of marketability. The easy availability of information on them, it is possible to check and see how they are progressing and what is happening. They could all be considered to more or less set the rate for that type of investment at the time.

I think that the purchaser, in buying the Hamburger Realty stock, would have wanted to obtain a greater return to compensate him for the undesirable features which are the closed corporation, the family corporation, the unharmonious relationship between what would then be the other stockholders; he would be a stranger in a family fight. Also, the lack of market and all the other features which we have already touched upon. Proceeding from that—shall I proceed from that point?

Q. Yes. [133]

A. The exhibits carry the earnings and the dividend record. The earnings for the five years, '37 to '41, inclusive, were \$166.00 a share. The dividends for the five years was \$172.00 a share.

There was a declining trend in the earnings which

(Testimony of Adolf K. Eitner.)

was obviously due to the increased tax item, as it shows up in the statement of receipts and expenditures.

In 1941 the earnings were \$151.44 a share, and the dividends paid \$149.60.

You have another factor to consider here. To touch on the taxes, they had increased from \$28,000.00 in 1937 to \$70,000.00 in 1944; Federal Income Taxes. There is another feature——

The Court: 1944 or 1941?

The Witness: 1941. I am sorry. There is another feature, and that is that beginning with January 1, 1943, the company is assured of obtaining \$50,000.00 a year or \$50.00 a share of additional income as a result of the setup in the May lease. It will not enjoy all of that income because its taxes would be—its tax bill would be increased as a result.

On the basis and conditions as they were then, it is reasonable to assume, I think, that they might have retained \$30,000.00 or 60 per cent of those earnings, which would have been available after that date to pay out in dividends. If you add back your \$30.00 to the 1941 earnings, which give [134] account to the current effect of taxes, you get a projected earning picture there after 1943 of about \$180.00 a share.

It had been the practice of the company, and there was no reason to assume any differently, they would pay out a hundred per cent of that in dividends. So you could assume there you had \$180.00

(Testimony of Adolf K. Eitner.)

dividend stock, in view of the going rate on other security, which I have enumerated here, have ranged all the way from 5.61 to 10 per cent. I have capitalized these earnings and dividends, using a 9 per cent factor, which brings you to \$2000.00 a share, 11 1/9th.

Q. The increase of the 9 per cent over the others being to take care of the——

A. To offset the undesirable features you have to take into account here that the 9 per cent capitalization is no greater than could you have obtained from Consolidated Edison or from General Motors at that time on the then going dividend rate or from Chesapeake & Ohio or Pennsylvania Railroad. It is greater than you could obtain from May Stores or International Harvester, Pacific Gas and Electric, in varying degrees. But it measures what, I believe, the purchaser would have required under those conditions to interest him, and I believe that it is on a reasonable basis, so that the seller would have found it reasonable under those conditions.

Q. What is your understanding of the meaning of the term "fair market value"? [135]

A. Fair market value is the value at which a willing and informed buyer and a willing and informed seller can have a meeting of minds as to the price.

Mr. Blum: Would it simplify the matter, your Honor, if we concentrated on each separately? For example, permit the respondent to cross-examine on this portion of it? Or do you want me to continue

(Testimony of Adolf K. Eitner.)

with the other stock, and then let him cross-examine on it all?

The Court: I think you might as well let the witness go ahead and testify. You gentlemen won't be confused. He won't be confused. If I have any confusion it will be removed when I re-read the record.

Mr. Tonjes: I would, if it meets with your Honor's approval, like to examine the witness now. The two corporations have a lot of similar matters. I have had this Realty Company in my mind, and I think it would be more convenient for me to cross-examine.

The Court: I have no desire one way or the other. If you gentlemen wish to agree upon another method of proceeding, you may do so; I have no objection.

Mr. Blum: It is satisfactory with me to have cross-examination now.

The Court: Very well. You may cross-examine on the Realty Company value. [136]

Cross-Examination

By Mr. Tonjes:

Q. I believe you stated you considered the earning capacity of the corporation? A. Yes, sir.

Q. How did you arrive at what you contemplated to be the earning capacity of the corporation?

A. I took the 1941 earnings and took the stepped up income, which would be received in 1943, less taxes, at the rate of 40 per cent, and projected the

(Testimony of Adolf K. Eitner.)

\$180.00 a share as a reasonable expectation under conditions as they then existed in both earnings and dividends.

Q. Do you know what rate of taxes the corporation paid for 1941?

A. It is evident in the exhibits, I believe. 1941 they had receipts, after expenses, of \$221,000.00, and their tax was \$70,000.00.

Q. I see.

A. Which indicates a 30 per cent rate paid in 1941. In 1941, that far along in the year, we were already having discussions of excess profits taxes, increased taxes.

Q. By 1941 there had been a considerable step up in the taxation rate at the time?

A. That is correct.

Q. I think that was due largely to the anticipation [137] perhaps of war and preparation and so forth in this country; isn't that true?

A. I would assume that was the case.

Q. It might reasonably be assumed, would it not, that when that had run its course there would be a reduction of taxation, too?

A. I don't think that is a reasonable assumption, no.

Q. You don't think so?

A. No. I am talking now about your basic 40 per cent rate.

Q. Yes.

A. And generally higher level of rates for an indefinite period of years than existed in 1941.

(Testimony of Adolf K. Eitner.)

Q. Now, Mr. Eitner, have you ever analyzed any corporations that were engaged primarily in holding real properties and renting them? A. Yes.

Q. Were they located in and about Los Angeles?

A. I am just trying to recall. We have been in quite a number of real estate situations and followed them both on the Pacific coast and other parts of the country. And in the general run of business you are in contact with them quite often.

Q. Did you ever analyze any corporation which owned any properties similar to the May Department Stores, and under a long-term lease? [138]

A. Yes. You have the securities of companies which have ground rentals. I assume, if I may, you are trying to get at the point as to how I regard that major asset, which practically represents the book value. I regard it very highly.

Q. No, that isn't exactly my point, Mr. Eitner. I am wondering why you used these corporations which were engaged in various commercial activities, the railroads and the like of that, in order to find a rate on which to base a capitalization.

A. You are talking now about the factor of continuity of income. I used American Telephone & Telegraph Company, which has paid \$9.00 for a great many years, and I think is generally expected to pay it. Pacific Gas and Electric Company established a \$2.00 rate for many years before and has paid it consistently.

Consolidated Edison had just reduced their rate to \$1.60, which is the rate I used; and they have

(Testimony of Adolf K. Eitner.)

maintained that rate. I did take into definite account the reasonable ability of these dividends.

Q. They were all from corporations engaged in various types of business, one furnishing transportation, another one furnishing merchandise?

A. That is correct.

Q. Did you analyze any corporations which were engaged primarily in holding real property for rental? [139]

A. I did not, not knowing any security which is in the general market, that is, actively traded, that would be directly comparable.

Q. So then why do you use the 9 per cent rate of the highest return to this real estate corporation?

A. That is not the highest return in these comparisons. It is my appraisal that the going rate from a good investment that was not prime at that time was around 6 to 7 per cent in a range. You have to be in a range. That the undesirable features in this case would demand a considerably higher rate on the purchaser.

Q. Did you make any inquiry into what rate of return real estate was producing in and about the City of Los Angeles?

A. I did not, not believing that to be pertinent in relation to the value of the stock.

Q. This corporation's entire activity was confined to holding real estate and collecting rents; was it not?

A. It was, but the buyer of the stock of Ham-

(Testimony of Adolf K. Eitner.)

burger Realty is not the buyer of real estate in Los Angeles.

Q. You don't know what the average return of real estate is, in other words?

Mr. Blum: Objected to as being incompetent, irrelevant and immaterial whether he knows or not. We are not appraising real estate.

The Court: He has answered. He says he does.

Q. (By Mr. Tonjes): You say you do?

A. No.

The Court: I misunderstood.

The Witness: I would say in a general way. I wouldn't assume to know.

Q. (By Mr. Tonjes): Did you make a search at all to find any corporation at all engaged in the business of holding real estate in order to ascertain their rate of return on their stock?

A. Yes, sir, I looked at the field of real estate bonds, the securities of real estate companies which were in the market at that time and were in general pyramided and were not a true comparison. To use those would probably push the value on this way down.

You have the case of office building bonds. You have the Russ Building in San Francisco which had some 6 per cent bonds due in 1951, then outstanding, which were worth around ninety in the market.

Q. What would the rate be?

A. 6 at ninety with ten years to run would be, I would say, about right around 6.50 to 6.60 yield.

(Testimony of Adolf K. Eitner.)

Q. I have a little difficulty in understanding what you use these corporations as in establishing a rate which you would consider in capitalization. [141]

Assume for a moment that the only asset that the Hamburger Realty Company had was a building which was producing \$5,000,000.00 a year—I mean was producing an annual rental of \$300,000.00 a year, and that building was leased to a corporation of national reputation, May Company,—

A. That is right.

Q. —and I think if that is true you could reasonably assume the May Company would continue to pay its rent.

A. I have a high regard for the May Company.

Q. For the duration of the lease.

A. That is right.

Q. And that would be a high type of investment if one individual owned that; would it not?

A. You are talking about the lease?

Q. Yes. A. That is correct.

Q. That would be a high type of investment; would it not? A. That is right.

Q. Now, if one man owned that, would you say that you would capitalize that \$300,000.00 at a 9 per cent rate?

Mr. Blum: Objected to as being incompetent, irrelevant and immaterial. The value of the May Company Building has been stipulated to in the stipulation of facts. We are not trying to determine what the value of \$300,000.00 a [142] year is. We

(Testimony of Adolf K. Eitner.)

are trying to determine what the fair market value of stock is in corporations,—

The Court: This is cross-examination. I think I would prefer to allow them a little latitude, even though I have some doubt as to the materiality of the testimony.

Mr. Tonjes: This is expert testimony.

The Court: You may proceed. I will overrule the objection.

The Witness: Your question is now whether I would capitalize the income from the May Company lease on a 9 per cent basis?

Q. (By Mr. Tonjes): Yes.

A. The answer is no, I would not. I would capitalize a little lower rate.

Q. At a lower rate? A. Yes.

Q. At what rate, would you say?

Mr. Blum: That is objected to as being incompetent, irrelevant and immaterial.

The Court: I don't think it is very material. I will sustain the objection.

The Witness: I would say a 6 per cent rate—

Mr. Blum: It has been objected to.

Mr. Tonjes: All right. [143]

The Witness: I am sorry.

Mr. Tonjes: If your Honor please, I think I am entitled to inquire into these matters on cross-examination.

The Court: I am going to allow you considerable latitude. He answered the question. We will let it stand.

(Testimony of Adolf K. Eitner.)

Mr. Tonjes: I understood the objection would be sustained.

The Court: I did. He has answered the question, so we will let the answer stand.

Mr. Tonjes: Will you read the last question and answer, please?

The Court: The substance of it was he would capitalize a \$300,000.00 item on those facts on a 6 per cent basis. Isn't that correct?

The Witness: Yes.

Q. (By Mr. Tonjes): How would you value the stock of the corporation in those circumstances?

Mr. Blum: Objected to as ambiguous.

The Witness: What circumstances are you enumerating?

Q. (By Mr. Tonjes): Under the circumstances we have present in this case.

Mr. Blum: Which corporation, the May Company?

Mr. Tonjes: No, the Hamburger Realty Company.

The Witness: I understood your question to be a [144] valuation of the lease, is it? Is that correct?

Q. (By Mr. Tonjes): That is right.

A. Now you are turning the lease into a corporation and you are asking me to value the stock of the corporation under what circumstances?

Q. Under the circumstances we have present here.

A. I have indicated a 9 per cent factor in my belief.

(Testimony of Adolf K. Eitner.)

Q. What factor, if you can point out, or what circumstances bring you to conclude that a 6 per cent factor would be reasonable under one circumstance and a 9 per cent in the other?

A. The factors that control are the fact that you are talking about a minority interest in the corporation. It is a family corporation. It is a closed corporation. There is no market for the stock. The buyer has to buy the stock with the prospect he will sit with it or be put to considerable trouble to find another buyer should he wish to liquidate.

Q. In your consideration or the use of the term "fair market value," is it your understanding that you have to have a buyer available?

A. It is my understanding that it is theoretical and academic to have a meeting of the minds between a theoretical buyer and a theoretical seller, because there has been no transaction that has taken place. [145]

Q. So you don't necessarily have to have an actual buyer in order to have a fair market value?

A. Yes. I am supposing that if it were up to me to find a place for this stock, at what price could I find a place for it?

Q. That is right. You don't necessarily have to have an actual buyer in mind?

A. Oh, no, no.

Mr. Tonjes: I think that is all.

The Court: Off the record.

(Discussion off the record.)

(Testimony of Adolf K. Eitner.)

The Court: On the record.

We will suspend at this time until 2:00 o'clock this afternoon.

(Whereupon, at 12:10 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same day.) [146]

Afternoon Session—2:00 P.M.

Whereupon,

ADOLF K. EITNER

resumed his testimony as follows:

Redirect Examination

By Mr. Blum:

Q. Mr. Eitner, before proceeding to the A. Hamburger & Sons, Inc., could you tell us whether the securities market on the basic date, October 13, 1941, was on an upward trend or a downward trend?

A. It was on a slightly downward trend.

Q. So that a person with money to invest at that time could have reasonably expected to have invested money at some later date and obtain a higher yield on the securities which you referred to, that is, American Telephone & Telegraph and the other stocks?

A. Well, they all subsequently sold lower. I don't know to what extent you could have relied to their selling lower. The trend was downward at the time, but not sharply so. It didn't turn off badly until after Pearl Harbor.

Q. Directing your attention to the——

(Testimony of Adolf K. Eitner.)

Mr. Tonjes: May I have one further question on cross-examination?

Mr. Blum: Yes.

Mr. Tonjes: Did you also inquire into the trend [147] of the market with respect to real properties in and about Los Angeles at that time?

The Witness: No, sir.

Mr. Tonjes: That is all.

Q. (By Mr. Blum): Directing your attention to the stock of A. Hamburger & Sons, Inc., assume, if you will, that Belle Alice Hamburger Nathan died on October 13, 1940.

Assume further that the Executors of the Last Will and Testament of said decedent elected to have the assets of her estate valued on the optional date provided by law, to wit, October 13, 1941.

Assume further that at the time of said decedent's death she was the owner of 425.817 shares of the capital stock of the A. Hamburger & Sons, Inc., and that her estate was the owner thereof on the basic date, to wit, October 13, 1941.

Assume further that on said basic date there was issued and outstanding 3774.183 shares of the capital stock of A. Hamburger & Sons, Inc., which said shares of stock were common stock and were owned as follows:

425.817 shares by Petitioners herein;

425.817 shares by Evelyn Hamburger;

425.817 shares by Jennie H. Marx, or by a Trust created by her;

(Testimony of Adolf K. Eitner.)

1248.366 shares by David A. Hamburger Corporation; and [148]

1248.366 shares by David A. Hamburger as Trustee of the Estate of M. A. Hamburger, deceased.

Assume further that on the basic date there were no other shares of stock, either common, preferred, or otherwise, and no bonds of the A. Hamburger & Sons, Inc., outstanding.

Assume further that no sales were ever made of any shares of stock of A. Hamburger & Sons, Inc., and that the said A. Hamburger & Sons, Inc., is a closed family corporation.

Assume further that on the basic date the President, General and Executive Manager of said corporation was David A. Hamburger, aged 84 years; that the Vice-President of said corporation on said basic date was Evelyn Hamburger, aged 72 years; and that the Secretary-Treasurer of said corporation was P. L. Nathan, aged 76 years; that Jennie H. Marx, one of the stockholders of said corporation, was 81 years of age.

Assume further that for a period of several years prior to the basic date the said David A. Hamburger had been ill and almost continuously confined to his bed.

Assume further that for many years prior to the basic date the said David A. Hamburger and the said P. L. Nathan did not speak to each other and that the said David A. Hamburger and the said

(Testimony of Adolf K. Eitner.)

Evelyn Hamburger and Jennie H. Marx were on in-harmonious terms and that each of them, together with the decedent, had their own and separate attorneys advising them in connection with the affairs of said corporation. [149]

Assuming further that the brothers and sisters above mentioned have engaged in quite serious and severe litigation among and between themselves.

Assume further that the testimony you heard in court this morning, given by Mr. Mitchell and Mr. Milliken, is true as to the directors opposing the proposal of any other directors with respect to investments and changes of properties and management policies.

Assume further that upon the death of the said David A. Hamburger, Evelyn Hamburger, and Jennie H. Marx, the control of said corporation and the management thereof will pass into the hands of the children of David A. Hamburger, none of whom have ever had any business training or experience nor ever worked for or in said corporation, with the exception of the daughter, who, for a period of time was on the board of directors, but neither the Articles of Incorporation nor the By-Laws of the said A. Hamburger & Sons, Inc., provided for cumulative voting of the stock.

Assume further that the assets of the A. Hamburger & Sons, Inc., their book value, and their fair market value, are as shown in Exhibit 4, heretofore introduced into evidence, which said Exhibit 4 is herewith shown to you.

(Testimony of Adolf K. Eitner.)

Assume further that the liabilities of said A. Hamburger & Sons, Inc., are as shown on said Exhibit 4, and that the net worth of said company is as shown on said Exhibit [150] 4; that the fair market value of said net worth is \$3,475,516.03, or an asset value per share of \$920.86, except no fair market value is included for the 104.167 shares of the Hamburger Realty Company owned by A. Hamburger & Sons, Inc.; no fair market value has been assigned to the 1 1-6th years' rental to be received on the A. Hamburger & Sons' lease to May Company.

Assume further that the profit and loss statements of said A. Hamburger & Sons, Inc., for the years 1936 to 1941, inclusive, are as shown on Exhibit 5, heretofore introduced into evidence.

Assume further that the dividends declared and paid for the years 1936 to 1941, inclusive, will be as shown in Exhibit 6, heretofore introduced into evidence; Exhibits 5 and 6 having both been shown to you.

Assume further that on or about the 30th day of March, 1923, there was in existence a lease of the Hamburger Realty Company to A. Hamburger & Sons, Inc., as lessee, providing for a stipulated rental of \$250,000.00 per year.

Assume further that on said 30th day of March, 1923, A. Hamburger & Sons, Inc., entered into a lease with the May Department Stores Company, subleasing the property situated on Broadway, Eighth, and Hill Streets in the City of Los Angeles, California, to the said May Department Stores

(Testimony of Adolf K. Eitner.)

Company for a period of twenty years for a total rental of \$10,355,625.50, payable at the rate of \$43,-148.44 per month. That on the [151] basic date said lease had one and one-sixth years unexpired term.

Assume further that on December 31, 1942, the aforesaid lease from Hamburger Realty Company to A. Hamburger & Sons, Inc., and the aforesaid lease from A. Hamburger & Sons, Inc., to the May Department Stores Company terminated.

Assume further that the A. Hamburger & Sons, Inc., is a corporation organized and existing under the laws of the State of California, with its principal office and only place of business located in the County of Los Angeles, State of California.

Assuming all of the foregoing facts, do you have an opinion as to the value of the 425.817 shares of the capital stock of the A. Hamburger & Sons, Inc., on the basic date, to wit, October 13, 1941?

A. Yes, I do.

Q. What is your opinion as to the fair market value of said stock on said date?

A. I believe the fair market value is \$337.30.

Q. In arriving at that value, what factors did you take into consideration?

A. I took into consideration the fact that A. Hamburger & Sons was a closed corporation and was further a family corporation; that there was an unharmonious situation among the stockholders and among the directors. [152]

I took into consideration the condition of the assets, the earnings' history, the dividend history, the

(Testimony of Adolf K. Eitner.)

prospective earnings as a result of the loss of the May lease and the Hamburger lease as well in a little over a year; and all other factors that one might reasonably take in appraising the value of the stock.

Q. Now, in taking into account the earnings' history and the dividend history of the company with respect to the loss of the approximately two hundred seventy-six thousand odd dollars upon the termination of the May Company lease and the Hamburger Realty Company lease, and considering that for a year and two months you would have that gross income coming into the company but thereafter you would not, how did you treat that?

A. I might not hear that dividend distributions have not been paid out of earnings for the 1941 year. They would have been paid, according to the practice of the company, in February or March of 1942 in one lump sum, and from the 1942 earnings which were still before the expiration of the Hamburger lease in February or March of '43.

I took both of those—let me see how it works here. The 1941 earnings were \$66.60. Assuming those earnings are repeated again in 1942 you have an expected dividend in '42 and again in '43 of \$66.60 each. Discount the March, 1942, dividend on a 6 per cent basis and the March, 1943, dividend on [153] an 8 per cent basis and you arrive at a value of that expected dividend income in those two immediately following years of \$122.66.

Q. Per share?

(Testimony of Adolf K. Eitner.)

A. Per share. Which is a part of the price of \$337.50.

Q. In your opinion, Mr. Eitner, would the stock of the A. Hamburger & Sons, Inc., be considered an investment security or a speculation security?

A. I think it would have been considered more speculative than investment.

Q. In your opinion, would the 425.817 shares here under consideration have to be sold as a block to one, or a group of purchasers, or would it have been parceled out in small share lots?

A. I think in this instance it might have happened either way, although the latter, that is, parceling it out, is possibly the more likely of the two.

Q. In arriving at the value for the A. Hamburger & Sons Company stock that you did, did you consider the factor of liquidation of this company and the consequent recovery of the asset value by the stockholders?

A. I assumed that from the general make-up of the corporation, in spite of the fact that there was no history or apparent indication of liquidation, there was a speculative chance that at some undeterminate future date some action in that [154] direction might have been taken which obviously would have lent speculative flavor had the assets remained as they were and not dissipated in the interim.

Q. Did you feel there was more likelihood of such a liquidation and recovery of the asset value by the stockholders of the A. Hamburger & Sons,

(Testimony of Adolf K. Eitner.)

Inc., stock than the Hamburger Realty Company stock on the basic date? A. Yes, I did.

Q. As I understand it, included in your value of \$337.50 is this \$122.66 representing the dividends assignable to the May Company lease for the 1942 and 1943 period, together with the other income for that period; is that correct?

A. That is correct, together with the other income.

Q. Together with the other income?

A. That is correct.

Q. With respect to the remaining, that would be \$215.00 a share, roughly, of your \$337.00? How was that arrived at?

A. That was arrived at by extracting from the earnings for the 1941 period, which were \$66.60, the probable loss in income after taxes, as a result of the loss of the May lease. That figure of \$267,000.00 a year is equal approximately to \$70.00 a share on the capitalized A. Hamburger & Sons stock. If 40 per cent of that is paid out in taxes, \$42.00 is retained, would be retained as earnings. In other words, they would give up—well, let's put it this way: taxes would [155] share in the loss as well as the stockholders, so you would deduct the \$42.00 from your \$66.60 and arrive at a projection on that basis equal to \$24.60 a share, roughly \$25.00.

Capitalizing that on a 10 per cent yield factor and on a ten times earning basis, the company had as well paid out all its earnings. You arrive at a figure of \$250.00. That, however, is paid

(Testimony of Adolf K. Eitner.)

for earnings and dividends which you are not going to enjoy for the two years because you have already taken those into account.

So discounting that on a 6 per cent basis would mean a discount factor there of \$36.00 and would result in \$214.75, \$215.00 roughly. It approximates \$337.50.

Q. Can you tell us, Mr. Eitner, on the basic date what the composite Dow Jones average yield rate was?

A. I believe it was about a little over 6 per cent on the industrial averages, and it ran either 7 or 8 per cent, right in that range, on rails and utilities. I am not certain of the exact, or I don't recall the exact figure on the latter. I may have it here. I doubt it. No, I haven't it. I think 7.34 on one and eight and a fraction on the other, as I remember it.

Q. Do you know what the averages of the Dow Jones were, the selling averages?

A. Around a hundred twenty-two, I believe.

Q. At that date? A. Yes. [156]

Mr. Blum: That is all.

Recross-Examination

By Mr. Tonjes:

Q. Mr. Eitner, you regarded the A. Hamburger & Sons stock as an investment security, did you say?

A. No, I said that the speculative factors were more dominant than the investment factor in the security.

(Testimony of Adolf K. Eitner.)

Q. You have examined Exhibit 4 attached to the stipulation of facts?

A. Is that the balance sheet?

Q. Yes.

A. With the values. Yes, sir, I have. I have it before me.

Q. Just what do you mean when you say a speculative investment?

A. Are you talking now about Exhibit 4 or about the stock?

Q. I am talking about the stock of Hamburger and Company and its relation to your characterization of its being the stock of the corporation being a speculative investment.

A. In my opinion.

Q. You say it is?

A. Yes.

Q. Now, just how did you arrive at that conclusion? [157]

A. You have the previous testimony regarding the makeup of the assets. You also have the previous testimony regarding the absolute stagnation of the management, nothing was being done with the assets. Maybe I shouldn't be that strenuous. No good business practice was being taken in the administering of the assets to have them produce on the basis that they might under good business management.

With that management in there and no indication there would be a change in that, your speculation is a fact, that at some indefinite, indeterminate future date there will be a change that will permit you to gain more than you had originally anticipated.

(Testimony of Adolf K. Eitner.)

the stock of a corporation that holds Government Bonds.

Q. That is a family holding corporation, you appreciate that. A. That is correct.

Q. Could you explain that a little more, bearing in mind this is a personal family holding corporation? [160]

Mr. Blum: By "holding corporation" are you speaking of it in the sense they are holding the assets or in the sense of the Internal Revenue Code?

Mr. Tonjes: In the sense they are holding the assets, not in the sense of the technical description of a holding company.

The Witness: I am sorry. I don't quite follow what you mean. Will you develop that point? Do you mean by that with respect to the present stockholders or this block of stock that is seeking a buyer at a price?

Q. (By Mr. Tonjes): Well, I mean the value of the stock of the corporation generally. Let's start from scratch again. This is, I believe, a corporation which is not engaged in business in the common accepted term; isn't that true?

A. I think that is true, yes.

Q. It doesn't buy anything or sell it or manufacture? A. It hasn't been.

Q. The purpose of it is to hold property, collect the fruits and benefits and profits?

A. And administer.

Q. Distribute the income.

A. That is correct.

(Testimony of Adolf K. Eitner.)

Q. Now, a corporation that functions in that manner would be expected to produce income based on the value of the [161] assets it owned; isn't that true? A. That is correct.

Q. If it held a large block of what might be called speculative investments, which at the present time are producing a high return, you would have then a comparatively low income with great security; isn't that true?

A. No, I think you are contradicting yourself; aren't you? You said if you have a corporation that has speculative securities that produce high income, that you would have a low income with greater security.

Q. I am wrong if I stated that, yes. You would have a high income. A. That is correct.

Q. And as a result of that, you would naturally expect a high rate of return?

A. That is correct.

Q. Would you say that is the situation in this Hamburger & Sons, Inc.?

A. Mr. Tonjes, I believe we have to reduce this to a per share basis in the relation to the price, if you will permit me to do so, in talking about these assets you are talking about now.

These Government Bonds and the block of \$100,000.00 of Municipals they have are equal to about \$271.00 a share. They have about \$33.00 a share of stocks, good representative [162] stocks, Standard of California, Union Oil, Texas Corporation.

They have liabilities here—I haven't reduced it

(Testimony of Adolf K. Eitner.)

per share. I will do it right now. They have liabilities of about close to \$150.00 a share. So if you offset your current liabilities against your liquid assets you have liquid assets there of about \$150.00 a share.

Now, if the prospective purchaser could reach in and benefit himself from those assets, that would be one thing. He has no assurance or indication he can. So far as the foreseeable future is concerned. Do I make myself clear?

Q. I think I understand what you mean, but I can't see how that justifies the value which you attempt to ascribe to the stock of this corporation.

Let me ask, did you make any effort to ascertain whether there were any corporations in and about Los Angeles who were engaged in the business of holding real estate and securities of this type?

A. Yes, I know of a number of corporations of that type.

Q. Did you examine their records or in any way ascertain what their income was?

A. They happen to be either personal holding companies or family holding companies of one sort or another without a market for their stock.

Q. You mean the information was not available?

A. The information was not available. [163]

Q. You think that a fair rate of capitalization of the earnings of this corporation would be 10 per cent? Was that your testimony?

A. That is the basis that I applied to the expected dividend income from it. I believe I also

(Testimony of Adolf K. Eitner.)

said that were it not for the speculative features that I believed the buyer might see in the stock that he would capitalize it probably at a higher rate or want to capitalize at a higher rate.

Q. How did you ascertain this 10 per cent would be a reasonable figure to use?

A. We have in the record on Hamburger Realty the going rates from general market representative stocks. Keeping those general rates that were available in the market in mind, along with the disadvantages which are represented to the stockholder by the different features, we have already enumerated in this stock, and considering what I thought were some speculative possibilities in it, I arrived at that rate.

Q. But none of those companies, as I recall, were in the business of holding miscellaneous parcels of real property.

A. That is correct. You have one example here in town that has been strictly a real property holding concern in this Los Angeles Investment Company. That stock up until comparatively recently had been selling in the market—I believe it is listed on the Exchange at prices ranging anywhere from a fifty to a seventy-five per cent discount from [164] what a reasonable liquidating expectation was. It was in the course of liquidation, however, and was not comparable to this because of that.

Q. You also found, did you, or you have also encountered instances where stocks are selling on the New York Exchange at prices which would

(Testimony of Adolf K. Eitner.)

yield as low as two and three per cent of their income? A. On October 13, 1941?

Q. Yes.

A. There may have been one or two, but they certainly were the exception rather than the rule.

Q. Well, you know of cases, do you not, where the corporations haven't paid any dividends in as many as five years and they sell at substantial prices? Isn't that true?

A. I don't know what you mean by "substantial price," Mr. Tonjes.

Q. Say \$25.00 to \$50.00 a share.

A. It is all relative, in relation to assets.

Q. But you do find that condition?

A. You find stocks that do not pay dividends selling for any variety of price you might almost say.

Mr. Tonjes: That is all. [165]

Redirect Examination

By Mr. Blum:

Q. As a matter of fact, Mr. Eitner, it is true, is it not, that back in 1927 and 1928 some of our best stocks were selling for one per cent yield, prices that gave about one and one and a half per cent yield, weren't they?

A. I think so, yes. Almost a negative yield.

Mr. Blum: The Court could take notice of the Laird case where that was brought out quite forcibly.

(Testimony of Adolf K. Eitner.)

Q. (By Mr. Blum): With respect to the assets which Mr. Tonjes has been questioning you about and as to the speculative quality of the A. Hamburger & Sons Company, did you take into account, in arriving at that conclusion, the fact that of the fair market net worth of three million, four hundred seventy-five thousand odd dollars, that approximately half of that is represented by loans to stockholders? A. Yes, I did.

Q. And that leaving approximately a million and three-quarters to assign to the other assets, which have been mentioned, and deducting from the million and three-quarters the approximately seven or eight hundred thousand of liquid assets would leave nine hundred thousand or a million dollars of the real estate assets of the company with respect to which the testimony was that if one director [166] proposed the sale of it the other one opposed the sale of it? A. That was correct.

Q. Did that enter into your opinion as to the speculative aspect of this stock?

A. Yes, it did.

Q. Do you know, Mr. Eitner, what the market average was in August of 1937?

A. I would say—you are now talking about the Dow Jones Industrial Averages?

Q. Yes.

A. Around a hundred ninety, thereabouts.

Q. From that date to the basic date did the market ever hit that average again? A. No.

Q. Has it hit it up to date?

(Testimony of Adolf K. Eitner.)

A. No, although it is reaching it right now.

Q. It is on an upward trend right now?

A. It has been hanging around a hundred eighty-five.

Q. With respect, Mr. Eitner, to the statement which you made that the purchaser would look to the possibility of a speculative gain by reason of a change in management some time in the indeterminate future, which might either use his assets to produce more income or might liquidate the corporation and return that asset value to the stockholder, were you mindful of the testimony of Mr. Mitchell and Mr. Millken [167] to the effect that probably succeeding management and controllers of this corporation would be the children of David A. Hamburger whom had had no business experience or had not indulged in any business enterprises, save one who had lost heavily in a mining deal?

A. Yes, I was aware of that and took it into account.

Q. Did the fact that the A. Hamburger & Sons stock, in accordance with Mr. Milliken's testimony, was not looked upon favorably by banking circles as security for loans enter into the picture of whether this would be a speculative or investment security?

A. That factor would have a bearing on the value of any security, valuation.

Q. The fact it was not favorably accepted by banking circles, as a security for a loan, would tend to increase or decrease the value of that stock?

(Testimony of Adolf K. Eitner.)

A. It would tend to decrease the value.

Mr. Blum: That is all.

Recross-Examination

By Mr. Tonjes:

Q. Mr. Eitner, I notice in your direct examination you testified with regard to the loans made to the stockholders? A. Yes.

Q. Those loans were made on the basis of two per cent, [168] according to Exhibit 4?

A. That is correct.

Q. Do you know what the going rate of interest was on a well secured loan at or about October 13, 1941? A. Long term loan to an individual?

Q. Well secured, yes.

A. Well, I don't know where an individual would go to borrow money—let's see, that would be 27-year money. I don't know where an individual would borrow 27-year money. Prior to 1935 our insurance companies used to make some collateral loans to individuals which were secured. They came pretty much to grief on those. The 27-year loan is not a bank loan. It is not an insurance company loan. It is a mortgage on your house or some such thing.

Q. Would you say that the loan to the individual stockholders by this corporation, wherein they gave their stock as collateral, was a well secured loan?

A. I would have to see the figures on the collateral.

(Testimony of Adolf K. Eitner.)

Q. They gave the corporation stock, the stock of A. Hamburger & Sons, Inc. as collateral?

A. Each in the amount they had?

Q. Yes.

A. It was not a well secured loan in the sense you could liquidate the collateral and receive payment readily.

Q. Do you know whether or not this loan was secured [169] by that type of collateral?

A. I am told it was secured by the A. Hamburger & Sons Corporation stock, and have been so informed.

Q. Do you know whether the stockholders could have borrowed money from other sources at two per cent interest?

A. I am quite positive they could not have.

Q. They could not? A. No.

Q. So that the stockholders themselves received an advantage over what might be termed an arm's length transaction in that connection?

Mr. Blum: I object to it as being incompetent, irrelevant and immaterial; assuming something not in evidence, in fact, directly contrary to the evidence. Mr. Mitchell testified these loans and the other matters were taken up in connection with the settlement of the will contest and the attorneys, each had their own attorneys.

The Court: I don't understand he is attempting to prove that as a fact. He is asking this more as a cross-examination of the witness. You are attempting to prove a fact by him?

(Testimony of Adolf K. Eitner.)

Mr. Tonjes: No, I am not. I am attempting to show these stockholders, by reason of the fact they were stockholders, had other advantages, such as the borrowing of money at a low rate of interest and sources from the [170] corporation where they could, not on the basis of the same collateral, borrow it from other sources.

Mr. Blum: We will stipulate to that, Mr. Tonjes; these particular stockholders didn't.

The Court: I don't know that there is a question pending. If there is we have probably forgotten. You might re-frame your question and see what the witness answers.

Q. (By Mr. Tonjes): I think your answer was yes; wasn't it?

A. No, I don't believe I answered it: I have lost the question en route.

Mr. Tonjes: Well, I think I stated what I was attempting to prove counsel said he would be willing to stipulate, so it suits my purpose.

The Court: As I understand it, counsel said he would stipulate as to the rate of interest, is that correct?

Mr. Blum: I said I would stipulate these particular stockholders, the Hamburger family, would enjoy a benefit which they could not receive elsewhere. So Mr. Tonjes won't be misled, I didn't say I would stipulate that the purchaser of that minority interest from one of the members of the family would.

Q. (By Mr. Tonjes): You recall what your

(Testimony of Adolf K. Eitner.)

testimony was, Mr. Eitner, regarding the possibility of liquidation of this corporation? [171]

A. I recall there was no imminent possibility of a liquidation, with circumstances as they existed on October 13, 1941. Any possibility of liquidation was purely speculative.

Q. Is there any doubt at all in your mind these assets could have been sold and the corporation liquidated for the total net worth, as shown on Exhibit 4?

A. No. As I understand it these are the agreed fair market values.

Q. Yes. A. I accepted them as such.

Q. So that in the event there was a liquidation there would have been——

A. There would have been this realization.

Q. This realization, yes.

A. That is correct.

Mr. Tonjes: I think that is all.

Redirect Examination

By Mr. Blum:

Q. Mr. Eitner, to carry on Mr. Tonjes' last question, if these assets had been sold by the corporation and then there had been a liquidation the stockholders, by reason of taxes, expenses and other items which enter into both sales and liquidations, would not have received the fair market value as stipulated here, is that correct, from your [172] experience? A. That is correct.

(Testimony of Adolf K. Eitner.)

Mr. Tonjes: At the same time you can see there could have been a liquidation in kind.

The Witness: In kind? What do you mean by "in kind," sir?

Mr. Tonjes: A distribution of the assets on a pro rata basis.

The Witness: I don't know what the legal involvements would be in that. Subject to that I would assume there could be such a liquidation.

Mr. Tonjes: I think the court will take judicial notice of that sort of a liquidation not being taxable.

Mr. Blum: You didn't ask the witness if that would be a taxable transaction; did you?

Mr. Tonjes: No, I didn't.

The Court: Is there anything further from this witness?

Mr. Tonjes: Nothing further.

Mr. Blum: That is all.

(Witness excused.)

Mr. Blum: Mr. Walker.

Whereupon,

THERON W. WALKER

called as a witness for and on behalf of the Petitioner, [173] having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your full name, please, sir?

The Witness: Theron W. Walker.

(Testimony of Theron W. Walker.)

Q. (By Mr. Blum): What is your business or occupation Mr. Walker?

A. I am manager of the adviser and research department of Bogardus, Frost & Banning, members of the New York Stock Exchange, New York Curb.

Q. How many offices do you have, Mr. Walker?

A. Three, two in California and one in New York; partners in the New York office.

Q. Where did you attend school, Mr. Walker?

A. The University of Iowa, from which I graduated in 1923 with a Bachelor of Arts degree, with a major in economics and related subjects.

Q. Where did you go into business after your graduation from college? After finishing Iowa where did you go?

A. I attended for two years and graduated from the Graduate School of Business at Harvard, Boston-Cambridge, in 1925.

Q. Following that did you go into business?

A. I went into the employ of a firm known as Lazard, Freres in New York City. [174]

Q. What was their type of business?

A. They were known as private international bankers, investing money for their own account largely, and also participating in underwriting, special investigations.

Q. What were your duties while so engaged?

A. For the 11 years I was with them I was almost exclusively in their statistical department, the last six of which I managed the statistical and research.

(Testimony of Theron W. Walker.)

Q. What is the function of the statistical department in such an investment house?

A. To appraise, analyze, cover, maintain the value of firms, investments, customers' investments, appraisal of individual holdings, both domestic and foreign.

Q. In connection with that are you called upon to look into various securities to arrive at a fair market value?

A. Constantly.

Q. Of those securities?

A. Constantly, both listed and unlisted, privately held and publicly held.

Q. Following your work with Lazard and Freres for 11 years, where did you next go?

A. I was employed by Schwabacher & Company and brought by them to Los Angeles.

Q. What type of business was Schwabacher & Company in? [175]

A. They are brokers, underwriters, investment dealers. I was employed by them to manage an advisory and research department in Los Angeles, and engage in the development of new deals, new underwritings.

Q. Did they have any stock exchange seats?

A. Yes, they were members of most of the exchanges in the country. I would like to add, at this point, I omitted to state the present firm I am an employee of is also a member of the Los Angeles Stock Exchange.

Q. How long were you with Schwabacher & Company?

A. Approximately a year.

(Testimony of Theron W. Walker.)

Q. After leaving Schwabacher's, where did you go?

A. I formed, in conjunction with another individual, an investment counsellor organization.

Q. How long were you engaged in that?

A. Three years.

Q. What were the functions of an investment counsellor?

A. To supervise the funds of individuals, to appraise their holdings by research field and otherwise.

Q. Were you counselling them as to the type of security to purchase and comparing securities into which they might put their money?

A. Constantly.

Q. Were you also, as an investment counsellor, [176] appraising various securities with the idea of determining which were the better securities to advise your clients to invest in? A. Yes, sir.

Q. Did that include both listed and unlisted securities? A. Yes, sir.

Q. Did that include closed corporations?

A. Yes.

Q. Did that include minority interests?

A. Yes, sir.

Q. Did that include any closed corporations which were contemplating placing their stock on the market, either over-the-counter sales——

A. A number of different times, yes.

Q. Upon the termination of that association, where did you next go?

(Testimony of Theron W. Walker.)

A. To the employ of the present firm, Bogardus, Frost & Banning. That was in 1940, if you would like the date, January, 1940.

Q. Just explain briefly what type of business your present firm is engaged in.

A. The present firm is a broker and investment adviser and occasionally a dealer in securities.

Q. Do they belong to any underwriting syndicates? [177]

A. On occasions.

Q. Do they participate in the underwriting of securities with respect to which it is necessary to appraise those securities?

A. More often the procedure has been what is known in the business as a finder of underwriting business, and the placing of that business with an underwriting organization, which involves the appraisal of the security.

Q. Do I understand by that you have or know of a security, block of securities, which it is desired to have marketed, that your firm finds an underwriter to market the security and underwrite it?

A. That, or it participates through some company which appears to be in need of financing in helping them determine the kind and type of security and the price at which it should be marketed.

Q. You have been shown, have you not, the stipulation of facts which has been entered into in this case, together with Exhibits 1 to 9, which I will show you, and ask you to look at and see if you have had copies of those instruments?

A. Yes, sir.

(Testimony of Theron W. Walker.)

Q. Then you were in the courtroom this morning when Mr. Mitchell, Mr. Sharp and Mr. Milliken testified? A. Yes, sir.

Q. You heard their testimony; did you? [178]

A. Yes.

Q. You had a copy of the hypothetical question which was asked Mr. Eitner with respect to the Hamburger Realty Company stock, did you not?

A. Yes, sir.

Q. And you heard the question which was read to Mr. Eitner in the courtroom today?

A. Yes, sir.

Q. And you have read the hypothetical question?

A. Yes, sir.

Mr. Blum: In order to save time, your Honor, I desire to offer the question we heretofore read to Mr. Eitner with respect to the Hamburger Realty Company stock and that it be deemed to have been read to Mr. Walker.

The Court: Is there any objection?

Mr. Tonjes: It will be so stipulated.

The Court: Very well. Do you understand the question, Mr. Walker?

The Witness: Yes.

The Court: You may answer the hypothetical question. Which company are you making special reference to?

Mr. Blum: The Hamburger Realty Company.

Q. (By Mr. Blum): First, assuming the facts which have just been read to you, do you have an opinion as to the fair market [179] value of the

(Testimony of Theron W. Walker.)

104.167 shares of the Hamburger Realty Company stock? A. As to the basic date?

Q. As to the basic date. A. I do.

Q. What is your opinion as to the fair market value of said stock on said date?

Mr. Tonjes: I object to the question, your Honor, on the ground this witness is not qualified. We have here a problem of evaluating the stock of a personal holding company engaged in the holding primarily of real estate. This witness has not been shown to be qualified or ever having valued any stocks of any corporations which are comparable to either of the corporations involved here, particularly the Hamburger Realty Company.

The Court: Well, we will permit him to answer the question. You may, of course, develop your theory upon cross-examination. I take it your objection goes more to the weight of the evidence than it does to the competency of the witness.

Mr. Tonjes: Very well.

The Court: I will overrule the objection.

Q. (By Mr. Blum): What is your opinion as to the fair market value? A. \$1,750.00. [180]

Q. \$1,750.00 a share? A. Yes.

The Court: That is the Hamburger Realty?

Mr. Blum: Hamburger Realty, yes, your Honor.

The Witness: Yes.

Q. (By Mr. Blum): Now, in arriving at that value, Mr. Walker, what factors did you take into account?

(Testimony of Theron W. Walker.)

A. I took into consideration the usual factors of analysis, the financial position of the company, including both its fixed and current assets, its earning power, its dividend power, its management, the factors that are—aside from the company's position, that is, what was the going rate for money at the time of October, 1941, which involves such factors as the state of the war, the probability of war increasing; factors that would govern an investor at that time.

Q. Did you take into account that this was a family, closed family corporation?

A. I also considered that factor, the character of the management as set forth in the stipulation and further set forth in testimony today.

Q. And the fact this was a minority interest in the corporation? A. Yes, sir.

Q. Did you form an opinion as to whether the stock of [181] the Hamburger Realty Company would be more of an investment security or speculative security? A. Yes, I did.

Q. Which do you think it would be more like?

A. I believe it would have the flavor of an investment company.

Q. What is your definition of an investment?

A. A commitment entered into for a substantial period of time, largely for the purpose of producing a secure income.

Q. Now, I believe you said you took into account the going rate of money on the basic date. Will you explain how you took that into account in arriving at your value of \$1,750.00?

(Testimony of Theron W. Walker.)

A. The sources for investment are competitive. A man with money, looking to put his funds at work at interest, determines and views the field to see what is the rate where he might best employ his funds, considering his disposition. That involves an appraisal of the bonds, preferred real estate mortgages, cash, any form of investment.

Q. Then, as I understand it, in arriving at the \$1750.00 share value you sought out securities and other forms of investments to determine what yield they give if invested in on the basic date?

A. I did, considering both the question of liquidity that might be offered in other fields and non-liquidity that [182] would be available in this type of investment.

Q. Would you explain to us what you found in that respect and how you applied it to the value of \$1750.00 arrived at for the Hamburger Realty Company, please?

A. I took, first of all, the Dow Jones Industrial Averages, which are generally assumed to represent a cross section of the industrial life of this country, and composed of companies whose existence and durability is not particularly questionable, any more than is the guarantee of the May Company on the lease involved.

I took the earnings on that Dow Jones average, the dividend that it was paying, the price at which it was selling, both on a five-year average basis and as of mid-October, 1941. I found during that five-

(Testimony of Theron W. Walker.)

year period the yield on that average ran as high as 6.8 per cent and ran as low as 3.5 per cent.

That in October of 1941 the yield was about 6.2 per cent on the then current price and that the stock was selling at 10.5 times earnings. That particular investment would be completely liquid, so that should the war at that time then proceed as it apparently was, with Germany very rapidly moving into Russia, the threat of the war in the Pacific rather imminent, the tax bill under discussion in this country for excess profits from war, the desire of an investor to be able to change his mind with some degree of [183] ease, should he so wish, if the circumstances developed rather adverse.

At that same date in October, as evidenced by testimony of Mr. Eitner, individual securities whose dividend record extends, in some cases, back to 1882, 1884, were selling to yield from six to ten per cent. So that a buyer would be influenced, a possible buyer of the Hamburger Realty Company stock would be influenced by attractions in other fields.

Q. That led you to apply a factor which you determined would be a fair factor to both the buyer and the seller?

A. It did. I considered the quality of the assets, the character of the earning power, its probable continuity and it appeared to me, in my best judgment, that the factor of ten times, both for earning and yield, would find a willing buyer, adequately in possession of the facts, and that the seller were simi-

(Testimony of Theron W. Walker.)

larly informed and willing to sell, could meet on that basis.

Q. You spoke a moment ago, Mr. Walker, about the possible desire of a purchaser wanting to get into a security where he could change his mind and perhaps get out, in other words, liquidity. You spoke of this security as being the probability of continuity of income by which, I assume, you meant rather fixed income? A. That is right. [184]

Q. Now, do you know what the history of a war with respect to inflation has been?

A. Every war that we have an economic record about, and following, has produced a very substantial price inflation. By which I mean the purchasing power of income has declined.

Q. Where you have a fixed income security do you have any heads, gains in inflation, or just how is a fixed income security affected by inflation?

A. A fixed income security is adversely affected by inflation.

Q. Would you consider that the Hamburger Realty Company stock had liquidity or did not have liquidity?

A. Definitely did not have liquidity.

Q. So that a person purchasing this stock as a fixed income security would not have been able to sell out and get into some security which might protect him against inflation; is that correct?

A. Not with ease that would be possible in a marketable security.

Q. Would that affect the price which the pur-

(Testimony of Theron W. Walker.)

chaser would want to pay for such a security as this Hamburger Realty Company stock?

A. Yes.

Q. With respect to the securities which you investigated [185] in determining a yield of a security in which a purchaser might have put his money on the basic date for purposes of determining the value of this security, did you find any securities the underlying assets of which were real estate, either bonds or stocks or otherwise?

A. Yes, there are a number of bonds that have as security a mortgage on property.

Q. Do you have any in mind particularly?

A. Well, there are two basic kinds, the operating companies, industrial, public utilities, rail and real estate holding company.

Q. Do you know of any local corporations which have real estate bonds outstanding, holding corporations or building corporations?

A. Yes, there have been several.

Q. Could you name any of them?

A. Foreman & Clark Building, the Fifth Street Store Building.

Q. Do you know at what yield they were selling on the basic date?

A. I do. The Foreman & Clark Building, which was a secured bond, six per cent due January 1, 1948, was on October 22nd, which was the closest price I could obtain, 1941, selling to yield at maturity 11.5 per cent.

(Testimony of Theron W. Walker.)

Q. Where is the Foreman & Clark Building located? [186]

A. The corner of Seventh and Hill, on the southwest corner.

Q. Do you know the general reputation, or do you know by general reputation whether the corporation at Seventh—what street did you say the Foreman & Clark Building was located at?

A. Seventh and Hill.

Q. The corner of Seventh and Hill is a more valuable piece of property or less valuable, from a business standpoint, than Eighth and Broadway or Eighth and Hill?

Mr. Tonjes: That is objected to, your Honor, as this witness is not qualified to state his opinion with respect to real property. He has not been qualified.

Mr. Blum: I am not asking him that. I am asking if he knows the general reputation. Anyone can testify to general reputation.

The Court: I don't know that it is very material, anyway; is it, gentlemen?

Q. (By Mr. Blum): Did you mention the Fifth Street Store? A. I did.

Q. Do you know what yield was being obtained at the price it was selling for on the basic date?

A. I do. Again, as of October 22nd, the yield to maturity of that obligation was 7.2 per cent. [187]

The Court: Is that all the direct examination of this witness?

Mr. Blum: Just a moment.

(Testimony of Theron W. Walker.)

Q. (By Mr. Blum): Did you investigate or do you know with relation to the sales of securities made with regard to the Subway Terminal Building?

A. No, I do not.

Q. With respect to the value found by you, did you take into account the ability of the purchaser or the owner of this minority interest of stock to have a voice in the management of the corporation?

A. Yes, I considered that factor.

Q. Would that affect the fact that a purchaser or the owner of this stock would have no voice in the management? Would that affect your value upwards or downwards?

A. Downwards.

Q. Did you take into account the fact that the stockholders of this corporation, individual stockholders, are elderly people and that the rather imminent possibility of their passing on might raise questions of additional borrowing for the paying of death taxes and expenses of administration?

A. Yes, I did.

Q. Did you take into account the fact that the owner [183] of the stock, one of the individual owners of the stock, in lieu of borrowing from the corporation, might place their stock on the market?

A. I did.

Q. If they had placed their stock on the market, would that have affected the value of this stock?

A. It would affect the value to the extent of which would be in part determined by the amount of additional stock offered.

Mr. Blum: That is all.

(Testimony of Theron W. Walker.)

The Court: We will suspend at this time for a brief recess.

(A short recess was taken.)

Cross-Examination

By Mr. Tonjes:

Q. Mr. Walker, you spoke of the Fifth Street Store. A. Fifth Street Store Building.

Q. There was a mortgage on that property; was there?

A. Collateral trust and refunding was the name of the obligation.

Q. It was the obligation that you were considering as having a certain return; is that right?

A. That is right.

Q. And you used that as a basis for determining what might be a rate of return which a buyer of this stock would expect. [189]

A. Only in the most general fashion, because it was not as—well, let me put it this way: in a very general fashion because it lacks a good many points of comparability.

Q. In the first place, they had no interest in the fee; did they? A. No.

Q. And any raise in value, of course, wouldn't reflect to the benefit of the security holder.

A. That is right. And also the fact that the certainty of the income was in much less doubt in the case of the Hamburger Realty Company.

Q. Do you know at what rate those securities sold? A. Which securities?

(Testimony of Theron W. Walker.)

Q. The securities which you spoke of, the Fifth Street Store obligation.

A. The price was ninety bid on that October 22nd, which I mentioned.

Q. What was the rate of interest in that obligation?

A. The basic rate was three per cent. The total rate was six per cent.

Q. What do you mean by the basic and total?

A. They were to be paid three per cent whether earned or not. Six per cent subject to the total earnings.

Q. I see. Now, do you know whether or not that obligation was secured by a mortgage on both the building and the [190] land on which the building was located?

A. No, I do not.

Q. You do not? A. No.

Q. It might well be that the security related to the building alone?

A. I have no knowledge.

Q. Could you tell me at what price the obligations of the Foreman and Clark Building were?

A. Seventy-five bid.

Q. Do you know at what rate of interest?

A. Six per cent.

Q. Six per cent? A. Yes.

Q. Do you know whether or not the security there covered both the land and the building?

A. I would rather not rely on my memory to state.

Q. Now, in the course of your experience in fixing the values of securities, has the greater part of

(Testimony of Theron W. Walker.)

your time been devoted to analyzing listed or unlisted securities? A. Listed.

Q. Listed? A. Yes.

Q. Have you ever made any analysis of corporations which were engaged primarily in holding real property? [191] A. Yes.

Q. Were any of them located, or rather was the property which those corporations held located in and about Los Angeles? A. Yes, sir.

Q. Could you give me the name of one or two of those? A. East Highland Orange Company.

Q. What sort of properties do they own?

A. Ranch and citrus property, probably the largest citrus ranch in California.

Q. Was it a corporate stock?

A. It was a corporate stock.

Q. Was it a common stock?

A. Common stock.

Q. Do you know what rate of return it yielded?

A. At the time it was paying no dividends.

Q. Paying none at all? A. No.

Q. What did it sell for?

A. It had no market. It was a private personal holding company.

Q. It had no market? A. No market.

Q. Did you investigate any others?

A. Of a similar nature?

Q. Yes. I mean corporations engaged in holding real [192] property, such as the Hamburger Realty Company. A. No, sir.

Q. You have not?

(Testimony of Theron W. Walker.)

A. No, sir, aside from such obligations as I mentioned before, the securities which are unlisted such as these bonds, Ambassador Hotel, similar obligations that one is confronted with.

Q. Yes. But they are not stock interests, they were obligations to pay?

A. There have also been certain stock interests, the Central Investment Company, the L. A. Investment Company.

Q. Well, did you investigate and analyze any of the common stock values? A. Yes.

Q. Of corporations engaged in the holding of real estate in and about Los Angeles?

A. Yes, sir.

Q. Which ones were they?

A. Central Investment Company, for one.

Q. Did it own property in and about Los Angeles? A. It owns the Biltmore.

Q. The Biltmore Hotel? A. Yes, sir.

Q. Do you know what the total value of the assets of that corporation were at the date you made the investigation? [193]

A. I don't know exactly, but I would say they were substantially, exceeded those of the Hamburger Realty.

Q. Do you know what the yield was based on a fair market value of those properties at that time?

A. Common stock was paying no dividends at that time.

Q. Paying no dividends? A. No.

(Testimony of Theron W. Walker.)

Q. Do you know what the stock was selling for at or about that time?

A. In the range of eight to ten.

Q. Eight to ten dollars a share?

A. Somewhere around there. I haven't refreshed my mind recently. It is a matter of some conjecture. It was rather depressed.

Q. Do you know what the par value would be?

A. \$100.00, I believe.

Q. \$100.00? A. Yes.

Q. In arriving at your value, you determined at what price you would recommend a purchase, the degree of security of investment?

A. I don't understand your question.

Q. When you recommend a certain price, as the purchase price of a common stock, do you consider the security of the investment? [194]

A. Do you mean the underlying assets or the security of the price?

Q. The underlying assets. A. Certainly.

Q. And whether or not those assets would be likely to decline a great deal in value?

A. I do.

Q. You do that? A. Yes, sir.

Q. Did you make such a comparison in the case of Hamburger Realty Company?

A. I did.

Q. What conclusion did you reach with respect to whether it was a good security investment or not?

A. I believe the assets and their value have been stipulated to, so I didn't concern myself as to

(Testimony of Theron W. Walker.)

whether they were of one sort or another, in terms of their value.

Q. Did you consider those assets good substantial assets?

A. Definitely. The May lease is a very substantial asset.

Q. What would the rate of return ordinarily be on a well secured investment?

A. What kind of an investment, a common stock or——

Q. No, an investment in a real estate holding corporation. [195]

A. It would be less desirable than many others.

Q. I am asking you what the rate of return would be, if you know?

Mr. Blum: I object to that as being ambiguous. You said you didn't mean in the common stock, you meant in a real estate holding corporation. Do you mean in the assets of the corporation or the common stock of a——

Q. (By Mr. Tonjes): You have stated that an investment in the Hamburger Realty Company would be a reasonably secure investment; is that correct?

A. That is right. I didn't say it that way, but that is the effect of my statement.

Q. Now, assuming that state of facts, what rate of return would an investor expect on his investment in buying the capital stock of the Hamburger Realty? A. Ten per cent.

(Testimony of Theron W. Walker.)

Q. Ten per cent, you say?

A. Yes, sir, as of the base date.

Q. As of the basic date? A. Yes.

Q. Would you say that ten per cent is a high or a low rate of return, considering investments generally?

A. As of that time I would say it was a very fair rate, risk considered. [196]

Q. I am speaking of investments generally as of 1941. A. So am I.

Q. You say ten per cent would be just a fair rate of return?

A. For a similar type of obligation, yes, sir.

Q. Could you tell me what corporations were paying dividends at a rate in excess of ten per cent at that time, which would have a comparable degree of security?

A. Consolidated Edison Company of New York began their dividends in 1885 and paid them consecutively to date with no interruption.

Q. At what rate?

A. The rate at the basic date was \$1.60, which at the then market price mid-October was ten per cent yield.

The Pennsylvania Railroad, having paid dividends without interruption from 1884 to date, was selling to yield 9.2 per cent.

General Motors, having paid dividends without interruption from 1915, was selling to yield 9.38 per cent.

American Telephone & Telegraph, with no varia-

(Testimony of Theron W. Walker.)

tion in its rate for many, many years, and having paid since 1881 without interruption, was selling to yield practically six per cent.

Q. Now, those are either rails or industrial companies or public utilities; is that correct? [197]

A. That is right.

Q. Do you know any real estate holding corporation, the stock of which was selling to yield six or ten per cent?

A. I gave you the bonds of a real estate company, the——

Q. I am not asking about the bonds. I am asking now for common capital stock of a real estate holding company.

A. Stocks of real estate holding companies are very few in number. In fact, I know of no company where they were publicly owned and publicly listed whereby one could make a reasonable check.

Q. You know of none that were yielding from six to ten per cent at or about that time?

A. No, sir.

Q. You also spoke, I believe, about the possibility of the United States being involved in the war and possible inflation.

A. Yes, sir.

Q. And that the yield based on the inflated value would, therefore, be less; is that correct?

A. If inflation takes place.

Q. If it came.

A. I didn't say the yield would be less. I said the purchasing power of your fixed income would decline.

(Testimony of Theron W. Walker.)

Q. Yes. Now, are you familiar with the trend of real estate values during periods of inflation, such as might be [198] expected in the event of war?

A. Yes, sir.

Q. Do you know what they do?

A. Yes, sir.

Q. What do they do?

A. It depends on the character of the real estate.

Q. What would you say about the price of a building, such as the May Company now occupies, with a fixed income on that property for a very substantial period of years ahead?

A. It would have less opportunity to advance in price than one where the obligation on a fixed income basis did not run more than a year or two.

Q. What would you say as to other properties generally located around town, such as on the balance sheet, Exhibit 1 of the stipulation?

A. On page 1 of Exhibit 1?

Q. Yes. Exhibit 1 consists of one page.

A. Well, in the first World War the rental prices were generally fixed by some governmental agency which restricted the rise in any real estate value, and one could reasonably expect with a similar war, and the Government already producing certain controls, that a similar occurrence would happen.

Q. These are to a large extent commercial properties used for business purposes?

A. I don't know. [199]

Q. Judging from the location of them they

(Testimony of Theron W. Walker.)

wouldn't seem to be residential properties; would they?

A. As I recall previous testimony,—

Q. I am asking you of your own knowledge.

A. —early this morning—

Q. I am asking you of your own knowledge, Mr. Walker.

A. —the remarks were made to the effect there were apartments and hotels. Certain of these, of course, are business properties. But based upon the testimony early this morning I would gather the more substantial properties were hotels and residences, apartments.

Q. You know nothing of these properties personally?

A. I didn't inspect them, no, sir.

Q. You base your conclusion then of the fair market value almost entirely on the earning capacity as it has been established by the record?

A. The earning capacity largely comes from the May lease, as I understand it.

Q. Do you know what that earning capacity would be for the entire term of the lease?

A. I didn't compute it, no.

Q. You don't know? A. No.

Q. \$300,000.00 a year for 30 years would be approximately \$9,000,000.00; is that correct? [200]

A. Yes.

Q. You, I suppose, in connection with your activities as an adviser have become in a general way familiar with the May Company?

A. Yes, sir.

(Testimony of Theron W. Walker.)

Q. They are a good substantial organization?

Mr. Blum: Objected to as being incompetent, irrelevant and immaterial. There is already an exhibit in evidence with respect to the May Company being in the Moody Manual, as to what type of store it is.

Mr. Tonjes: We introduced in evidence a copy of Moody's report. Here is a man who states he is familiar with various stock values and commercial organizations, and I think he can state what his opinion is with regard to its stability.

The Court: The objection is overruled.

The Witness: I think the May Company is generally known, in our business, as being a sound investment, evidenced by the fact it has paid consecutive dividends since 1911, despite which fact it was selling on the basic date to yield 5.6 per cent.

Q. (By Mr. Tonjes): The buyer of the stock of Hamburger Realty Company might reasonably anticipate the entire lease contract would be carried out? A. I would assume so. [201]

Q. I believe you also spoke about the management of the Hamburger Realty Company. Tell me briefly what your understanding is of the management.

A. The management is composed of the owners of the business through the stock. They are a family that are definitely at odds with other parts of the family. They are unable apparently to agree upon any particular policy.

(Testimony of Theron W. Walker.)

Q. Do you know exactly what management is necessary for the continuation of the corporation's activities, considering, of course, the nature of the way the property is tied up by leases and so forth?

A. It would presumably require less management than that of an active operating company, yes, because of the nature of the May lease and the source of the income.

Q. Can you think of anything they have to do?

A. Yes, I think it requires knowledge of the lease, ability to see their hazards and risks under that lease and the insurance pictures given us this morning.

Q. That lease was in effect at this particular date. There wasn't much they could do about that; was there?

A. No, but they should have protected themselves under the terms of that lease.

Q. What do you mean by "protect themselves"?

A. As to the fire insurance and other hazards.

Mr. Tonjes: I think that is all. [202]

Redirect Examination

By Mr. Blum:

Q. Mr. Walker, it has been intimated to you that the real estate shown on Exhibit 1, other than Item 1, being the May Company Building, was business property. If that intimation is true and if that was business property, would there be any management, managerial duties with respect to those properties?

(Testimony of Theron W. Walker.)

A. Certainly. If the full value of the assets is to be realized upon.

Q. Is the ownership of 275 shares of Farmers and Merchants National Bank a rather substantial block; do you know?

A. Yes, it would be considered substantial.

Q. Owning that stock, would that require certain managerial duties with respect to voting of it and electing members of the board of directors of the Farmers and Merchants National Bank?

A. Yes, sir.

Q. In other words, without posing as an expert on management, there would be certain foreseeable, from Exhibit 1 there would be certain managerial duties the manager of the Hamburger Realty Company would have to do?

A. That is correct. I think any buyer, other than the family, would certainly want some managerial talent.

Q. Would the fact that the total liabilities are [203] approximately, I should say, four to five times the current assets indicate any particular problems with respect to management?

A. It would indicate to me that the management had not chosen to create what I would consider a safe working capital to properly develop its other assets than the May lease.

Q. You were asked whether you knew any real estate common stocks yielding from six to ten per cent on dividends. Do you know of any real estate,

(Testimony of Theron W. Walker.)

common stock, yielding any other percentage of dividends?

A. Only the ones I mentioned, which were yielding——

Q. I mean other than those bonds you mentioned or the Central Investment or the East Highland?

A. No, the history of real estate holdings properties have been a rather poor one for the holders of the stock or the bonds.

Q. And they consequently sell at a very reduced rate on the asset value?

A. They sell at a discount from the asset value larger than would be true of other properties, such as United States Steel, which also sells considerably under its asset value.

Q. Do you know the number of shares outstanding of the Central Investment Company?

A. No, I do not.

Q. Did you take into account, Mr. Walker, the fact that [204] although the money is coming into the Hamburger Realty Company from the May Company and are, as you stated, I believe, very safe and very reasonable probability of receipt of it by the company, but did you take into account the fact that once it gets into the company the Hamburger family would be in control of whether they desired to pay out dividends or accumulate it and make investments? A. I did.

Q. Did you take into account with respect to their accumulating and making investments the

(Testimony of Theron W. Walker.)

type of management that would be making those investments?

A. I did. I think a buyer would much prefer a responsible board of directors.

Q. Would such a situation as would exist in that event affect the value of the stock?

A. It would affect it adversely as it now exists.

Q. As investment counsellor, would you have advised a client to purchase the Consolidated Edison stock at a ten per cent yield or the Hamburger Realty stock at a ten per cent yield?

A. That would depend upon the position and preference of the client and his investment requirements. A certain type of buyer would prefer one and a certain type of buyer would prefer the other.

Q. In your opinion, both having the same yield in that [205] respect, they would be comparable for the investment?

A. If the buyer were looking for ten per cent, he perhaps would choose between the two, based on the merit of the company.

Q. Let's put it this way: assuming a buyer, without any portfolio at all, just with a lot of cash money coming in to start a portfolio, would you have thought it a better risk for him to buy in the Consolidated Edison at ten per cent or to buy in the Hamburger Realty at ten per cent?

A. If he was looking for a certain fixed income over a certain period of years, I believe the Hamburger Realty would have been his choice, on my recommendation.

(Testimony of Theron W. Walker.)

Q. What would be the result with respect to the liquidity desires of the purchaser?

A. If he wished to remain liquid, he would purchase Consolidated Edison.

Q. And in your experience in the investment field do you find the majority of purchasers of securities want liquidity or not?

A. The majority of purchasers prefer liquidity, especially in a period such as was then existent.

Mr. Blum: That is all.

Recross-Examination

By Mr. Tonjes:

Q. Just one question, Mr. Walker. I believe you stated [206] from your examination of Exhibit 1 that the current assets of the corporation were more than should be carried. Is that correct? Or something to that effect.

A. I made some such observation.

Q. Yes. I think it was for the purpose of showing that in the event they wanted to make any additions or improvements or repairs to their properties they would not be in a position to do so. Do you recall that?

A. I didn't put it quite that broad, but that was the general feeling, that the net quick assets, as we call it in our business, were less substantial for a company of this size than one would generally expect, yes.

Q. Now, do you know of any properties which the company had at that time that required any expenditures?

(Testimony of Theron W. Walker.)

A. I am not familiar with the properties, sir. The values to them were stipulated to. I didn't see fit to go back of it.

Q. If that was the situation, it probably would be advantageous to the corporation not to carry any large cash balance, but rather to keep the money in forms of investment, which are producing income, assuming that to be true?

A. Not being part of the company's management, I don't believe I am qualified to answer that.

Mr. Tonjes: Those are all the questions I have.

The Court: It occurs to me—maybe you gentlemen [207] have it straighter in your minds than I have—but in connection with this May property, which seems to have a book value of less than \$2,000,000.00 but a fair market value, or stated to be a fair market value of \$4,000,000.00, to what extent, if at all, does the so-called good or advantageous lease, if any, enter into the fixing of that fee or \$4,000,000.00?

Mr. Blum: I can answer that, your Honor, by stating just how we arrived at the \$4,000,000.00 for purposes of this value.

The Court: You see what is running through my mind—I think you probably do—from the nature of my inquiry. If you wish to explain it, it is all right. I don't want to try to tell you how to try your case.

Mr. Tonjes: If Mr. Blum's explanation is inconsistent with my thoughts, I will express mine.

(Testimony of Theron W. Walker.)

Mr. Blum: We took the rentals to be collected and used the seven per cent discount basis,——

The Court: That is looking forward over the 30-year period when you were to collect the \$9,000,000.00?

Mr. Blum: That is correct, your Honor. And we discounted that down to a seven per cent basis, and that came out—my figures may be a little bit off—to something like three and three-quarters million.

We added back approximately a quarter of a million for residual value of the fee, which the Hamburger Realty [208] Company would own, but which it wouldn't get for 30 years. In other words, we took a present day value of the building and assumed that would be its value without the lease in 1972, and discounted that back.

The Court: That was the point I was making. What you have stipulated here as fair market value does give effect to the May Company lease; is that correct?

Mr. Tonjes: Oh, yes, your Honor.

The Court: I see.

Mr. Blum: That is a fairly accurate statement of the way we arrived at it.

Mr. Tonjes: Yes.

The Court: I don't care so much about how you arrived at it, I was wondering about whether you had given effect to the lease itself in determining that figure. Do you wish to proceed on the other phase of the other valuation?

Mr. Blum: May it be stipulated that the ques-

(Testimony of Theron W. Walker.)

tion asked Mr. Eitner, with respect to the stock of A. Hamburger & Sons, Inc. may be deemed to have been read to Mr. Walker?

Mr. Tonjes: Yes, that is stipulated.

The Court: You recollect, do you Mr. Walker, the hypothetical question asked with reference to the A. Hamburger & Sons stock?

The Witness: Yes, I heard it read, and I read it.

The Court: You may take the short cut. Proceed. [209]

Redirect Examination

By Mr. Blum:

Q. Assuming those facts, Mr. Walker, do you have an opinion as to the fair market value of the 425.817 shares of the capital stock of A. Hamburger & Sons, Inc. on the basic date?

A. I do. I arrived at a figure of \$297.66.

The Court: Per share?

The Witness: Per share.

Mr. Tonjes: What is that figure, Mr. Walker?

The Witness: \$297.66.

Q. (By Mr. Blum): Will you tell us how you arrived at that figure, Mr. Walker?

A. The position of A. Hamburger & Sons being substantially different from that of the Hamburger Realty Company, for the reasons many times set forth here, hinging upon its loss of what is known as the May lease, the reliance upon earnings and dividends, changes considerably in this picture as against the Hamburger Realty.

(Testimony of Theron W. Walker.)

Without that type of security, one must look to the other assets of A. Hamburger & Sons for the revenue. And looking at 1943, which was the first full year of results, ex the May lease, one calculates earnings at \$20.10 per share. The 1943 earnings showed a drop in receipts from 1942 from [210] \$417,000.00 down to \$154,000.00, in round figures.

Expenses, however, declined from \$61,000.00 down to only about \$54,000.00. So that with reference to the management of this company and the comments made thereon, looking into the future and the appraising of that potential earning power, one has to consider how active the management will be in bringing its expenses into line with its reduced growth and such other factors as the incidents of war time taxation, the financial position of the company, the fact it is a family holding company, as set forth here in general—not as a tax matter—one cannot be sure of what the management will do, and that leads me to take that \$20.00 earnings as a base and add to it the probable income from the \$50,000.00 which was heretofore set forth as being further earnings; allowing taxes on a 50 per cent basis—actually the tax rate would be higher for the duration of the war, including excess profit taxes, and sometimes perhaps after that—I arrived at an estimated projection of \$25.00 a share.

Relying, I believe, in a generous manner on the past history of the company to pay out all of its dividends, I assumed the dividends would also be \$25.00 a share. The character of the assets being

(Testimony of Theron W. Walker.)

different, I assumed that the valuation of those assets in the market would also be different and would have to be discounted from that set for the Hamburger Realty Company. I arrived at a figure of seven times earnings as being, [211] in my judgment, a fair appraisal of the earnings, and at that price earnings ratio, a yield of 14.3 per cent would be from the \$25.00 dividends on the basis of \$175.00 price, as set forth by Mr. Eitner, the carry over of earnings would produce a larger dividend; and discounting it as he did by six and eight per cent factors, I arrived at the same figure he had of \$122.66 as a dividend discount figure, to which I added the one hundred seventy-five base stock figure and obtained the value of the total of \$297.66.

Q. I understand you used the same method Mr. Eitner did, except you used a seven times earning instead of a ten times earning for the income to be expected after January 1, 1943.

A. That is right. I chose to evaluate the business at a lower ratio.

Q. In your opinion, would the stock of the A. Hamburger & Sons, Inc. be classified as a speculative security or an investment security?

A. I think it would take on the character of a speculation?

Q. In arriving at the value which you have, of \$297.66, and in arriving at your yield factor, did you take into account the fact that A. Hamburger & Sons, Inc. was a closed family corporation.

A. Yes.

(Testimony of Theron W. Walker.)

Q. That this was a minority interest? [212]

A. Definitely.

Q. And the management, type of management, both present and expected future?

A. Type of management.

Q. The fact we were on a down trend of the market? A. Yes.

Q. The asset value?

A. Yes, sir. I also considered the fact that apparently up to some given date it had been the practice of the management to borrow from the company, which privilege might or might not run to the minority interest, being an outsider who would take on this additional stock.

Q. With respect to the general factors that you mentioned in regard to Hamburger Realty Company valuation, economic and European war, and so forth, you took those factors into account in evaluating the A. Hamburger & Sons, Inc., also?

A. I did, plus the fact that one was not as sure of the income in this situation as one would be with the May guarantee on the income of the other company.

Q. In arriving at the yield factor, you took into account the same yields of other securities which you mentioned with regard to Hamburger Realty Company stock? A. I did.

Q. Did you take into account any additional securities which you didn't mention, or any additional factors which [213] haven't been mentioned?

A. As concerns the difference in yield between

(Testimony of Theron W. Walker.)

the securities previously mentioned and well known by all of us and the yield assumed for this common stock of A. Hamburger & Sons, a competent analyst must look to the character of the assets. The certainty of those assets being properly managed and producing an income commensurate with their value, that is a factor that led me to place a higher yield on the stock of the A. Hamburger & Sons.

Mr. Blum: That is all.

Recross-Examination

By Mr. Tonjes:

Q. Mr. Walker, what did you say you considered to be the yield that an investor would expect on the A. Hamburger & Sons stock?

A. On the base price or upon the price that I set as \$297.66, the total appraisal?

Q. Well, you stated that the stock, in your opinion, was worth \$297.66. Did you determine that figure by applying a percentage to that and determining what the yield would be on that figure?

A. I did. The yield on that figure, on \$25.00 assumed dividends would be 8.4 per cent.

Q. 8.4? A. 8.4. [214]

Q. You consider that to be in harmony with the risks involved?

A. No. I perhaps did not make my explanation plain initially. The base price for that stock I computed to be at \$175.00, to which we added the expectancy of these two years of heavy dividends, discounted by the two factors, one of six and one of eight, for the longer run.

(Testimony of Theron W. Walker.)

Therefore, I would look—since you are going to get that dividend we presume and we have discounted it, therefore, your base price is \$175.00, which the buyer, in effect, is paying, because he is getting this other money back, plus the return on it between now and then, using the discount factor. On that price the \$25.00 dividend would yield 14.3 per cent in my calculations.

Q. Well, I am a little bit confused with all these figures. I wonder if you could tell me, taking all of those things into consideration, what percentage of yield a buyer would expect to receive on October 13, 1941?

A. 14.3 per cent.

Q. 14.3 per cent?

A. For this type of risk.

Q. Now, Mr. Walker, did you examine the balance sheet there, which is Exhibit 4?

A. I did.

Q. Would it be accurate to state that it shows that the [215] corporation owned approximately \$750,000.00 in Government Bonds?

A. I believe so.

Q. And that is, would you say, a high type of investment with respect to security?

A. Are you speaking of Government Bonds as an investment, ex —

Q. Which the corporation owned.

A. Of course, Government Bonds are a high type of investment, but bought through a company such

(Testimony of Theron W. Walker.)

as this, one looks at other things than just one type of its assets.

Q. Oh, unquestionably. But for an individual who wanted security, would or would he not take into consideration the fact that A. Hamburger & Sons owned approximately \$750,000.00 in Government Bonds?

A. He would take it into consideration, but not as offering him a great deal of security.

Q. Would you say that that would offer no inducement to him to accept a lower yield for his investment?

A. I would say it would be a very minor factor in this situation at that time in October of 1941 with companies whose business it is to invest in marketable securities and whose equity is listed on the stock exchange and are selling at substantial discounts, despite the fact their assets were selling at 20 per cent of Government Bonds and other bonds.

Q. Did you also take into consideration that the remaining [216] assets were assets in the form, to a large degree, of diversified real estate holdings?

A. I did.

Q. Considering the investment field generally, would you say the investment in real estate, assuming them to be reasonably diversified, is a reasonably secure investment?

A. If properly managed. But it requires a high degree of management.

Q. And is it your opinion that an investor in

(Testimony of Theron W. Walker.)

diversified real estate could reasonably expect a 14 per cent return on his investment?

A. Under this kind of condition, yes, because at that time——

Q. I mean generally. I mean with respect to real estate.

A. You can't be general and be specific.

Q. Would you say that a man investing in the real estate set forth on Exhibit 4 would expect a yield of 14 per cent on his investment?

A. In this company, as it was managed, yes, sir.

Q. I mean with respect to the real estate itself.

A. I still would answer it the same way.

Q. You say that a man investing a sum of money equal to the total of the real estate set forth on Exhibit 4 would expect a yield of 14 per cent on his investment?

A. I think that was quite common at that time, yes. [217]

Q. You also spoke of a possibility, I believe, or the necessity of the reduction of expenses. Do you recall how you used that phrase?

A. Yes. On Exhibit 5 I observed that in 1943 the receipts had fallen to \$155,000.00 from \$417,000.00 in the preceding year.

Q. What year was that, Mr. Walker?

A. '43, as against '42.

Q. You didn't use 1943 in your considerations; did you. Your consideration of the estimate of the earnings?

A. I used '43 as a base starting point, because

(Testimony of Theron W. Walker.)

that is the first year in which the company's earnings would give effect to the loss of the May lease. I then added back to it the anticipated 50, or whatever the gross amount of dollars was, and allowed for a 50 per cent tax to obtain a figure of \$25.00 of earnings.

Q. I see. Well, do you know what the nature of their expenses were that you thought they might curtail or reduce?

A. I would assume it would be largely salary. I have not seen a breakdown of their expenses. A business that has a gross of \$150,000.00, cannot support the same expense level that a business of \$400,000.00 can support.

Q. In the use of the income for the year——

A. May I interrupt you just a minute?

Q. Pardon me? [218]

A. I brought up that to say that I had assumed in my calculation of continued earning power, on the basis that the company would be operating following December 31, 1942, and would through the management effect some reduction its outgo in order to conserve its income at the reduced level, and thus make possible some increase in earnings over the '42 level, despite a probability of higher taxes. In other words, I was assuming on what I chose to believe a favorable point of view.

Q. You used the earnings for the years both 1942 and 1943 in projecting the future prospects?

A. I used as a base the earnings of 1943 with the adjustment I spoke of.

(Testimony of Theron W. Walker.)

Q. Yes. Now, 1942 and 1943 were war years; were they not? A. Yes.

Q. And the rates of income taxes were considerably over what they had been for the past decade, we would say? A. That is right.

Q. Did you make any adjustment for the possibility that the war might ultimately terminate and income taxes be reduced?

A. I did. That is why I credited them with that additional income that comes in in '43, as far as the partial offset to the other loss, with a rate of only 50 per cent tax total. Whereas, the projected rate as of October '41, with the excess profit tax under consideration, would be substantially in [219] excess of the 50 per cent rate.

I also assumed that the war in its magnitude would be quite expensive and would require a considerably increased governmental income, in order to carry the debt, and that such income requirements would require a considerably higher level of both corporate and income tax levels for a good many years than we have had in the past decade.

Q. You assumed, even though the book value of the net worth of the corporation was in excess of \$4,000,000.00, that an income of approximately \$400,000.00, why, they would be subject to a quite high excess profits tax?

A. It seemed like it.

Q. You also considered the fact, did you, Mr. Walker, that the corporation owned a warehouse which was under a long term lease?

(Testimony of Theron W. Walker.)

A. I think that is a part of the stipulation, as to the value of the assets and the income derived therefrom; is it not?

Q. Yes. But did you consider the fact the corporation might reasonably look forward to the receipt of that income, regardless of business conditions?

A. Since the income gross was not broken down in any of the statements made available, as stipulated hereto, I could not determine the percentage of income derived from any one property.

Mr. Tonjes: I think that is all. [220]

Redirect Examination

By Mr. Blum:

Q. Speaking of using the year 1943, Mr. Walker, do you mean that for the purposes of applying the 14.3 yield rate, which you spoke of, to the dividends, that you took what would be the expected earnings, beginning with that year, predicated upon the past earnings of the company, less the income which would be lost to the company by reason of the termination of the May Company lease?

A. That is right. I assumed 1943 earnings were the residue of the earnings of the business, ex the May lease. And added to that residue this other figure that has been mentioned, which would help increase those residual earnings somewhat.

Q. You computed that figure yourself; did you not? A. That is right.

Q. You didn't take the actual earnings as shown

(Testimony of Theron W. Walker.)

on the stipulation of \$74,000.00 as the figure; did you? That isn't what you meant when you said you were taking 1943?

A. Yes. I took that \$74,600.00 deducted therefrom. I do not have it here in front of me, the actual amount, but it is the equivalent on a per share basis of about \$46.50.

Q. In other words, you took as the difference between a prior 5-year level and the loss of the May Company lease to be the earnings shown at '43, and assumed those would be the earnings to project into the future? [221]

A. The 1941 earnings were equal to \$66.60 a share. The 1943 earnings were equal to \$20.10 a share, to which I added that, plus residual factor we have spoken about, which increased those '43 earnings by 25 per cent.

Q. Now, in increasing the 1943 earnings, which you say work out to \$25.00 a share, which you used as the projected expected earnings; is that correct?

A. Yes.

Q. You assumed that that additional approximately \$5.00 would be made up from a reduction of taxes and reduction of expenses of operation; is that correct?

A. In part, yes.

The Court: Is that all from this witness?

Q. (By Mr. Blum): Would your opinion be changed as to the fair market value of the A. Hamburger & Sons stock if you were advised that the warehouse which Mr. Tonjes referred to had a

(Testimony of Theron W. Walker.)

lease on it to the May Company Department Stores for \$24,000.00 a year?

A. It would change my estimate somewhat, but only fractionally in terms of the total picture that would aggregate, as using '43 again, about a third of their gross income.

Q. Yes. It would be about a third of their gross income.

A. Which, in turn, was half of the expenses, that is, the \$25,000.00 or \$24,000.00 from that warehouse and was not quite half of 1943's expenses before taxes. [222]

Q. That would, you say, increase or change your estimate, your opinion, as to the value of the stock slightly?

A. About one or two per cent. I have here some statistics on a company named Murray Ohio Manufacturing Company. It is, I believe, about 40 per cent owned by Sears Roebuck, and Sears Roebuck buys a great deal of its output.

This company has paid dividends for a good many years, has had earnings in a year such as 1938, when many industrials were having a considerable decline in earnings to sometimes a deficit, indicating that the ownership of Sears Roebuck saw to it they got enough business or more.

The yield on that stock, taking the average of the high and low for October, was 12.6 per cent.

The Court: October of 1941?

The Witness: 1941. From a dividend that was covered in that year very nearly two for one. The

(Testimony of Theron W. Walker.)

company had net quick assets that accounted for about seven-ninths of its then market value. It had no long term or preferred stock. It was purely an equity proposition. This was also a listed issue.

Q. (By Mr. Blum): With the effect of the \$24,000.00 a year from May Company you would say one or two per cent, which would be approximately \$300.00 a share, instead of \$297.00 or \$302.00 a share? A. That is right. [223]

Mr. Blum: That is all.

Mr. Tonjes: No further questions, Mr. Walker.

The Court: I think, in spite of what you gentlemen said about preferring to continue this case this evening, I am going to suspend.

Mr. Tonjes: I think that would be advisable.

The Court: I think I will be on the record in stating just one or two little things. I am not necessarily trying to tell you gentlemen how to try your law suit, but I am interested a little in this group of items in the balance sheet, Exhibit No. 4, obviously representing loans from the corporation to stockholders. I see some of them are carried at a fair market value of only 75 per cent of the book value. I would like to have that explained to me sooner or later.

I see there are several of them that are substantially reduced, and some of them are in the same figure. I think probably Mr. Walker did not direct any of his attention to that particular phase, though the other witness did. I was left rather confused. I should have mentioned it at the time and did not do so.

I am a little bit confused as to just what effect each of you thought that these stockholder loans had upon valuation. Don't misunderstand me. You don't need to respond at this time. You can think it over and tell me whatever you want to in the morning or you can drop it. I am only saying [224] that only vaguely do I have the theory of either of you as to the effect of these stockholder loans upon our problem of valuation. You don't need to say anything at this time. It is your case and you try it to suit yourselves.

Mr. Blum: We appreciate that observation, your Honor. As far as we are concerned, we will be happy to go into it fully for your Honor's enlightenment.

The Court: We will suspend until 9:30 tomorrow morning.

(Whereupon, at 5:00 p.m., a recess was taken until 9:30 a.m., Friday, October 5, 1945.) [225]

Proceedings October 5, 1945, 9:35 a.m.

The Court: We may proceed with the Nathan case.

Mr. Blum: May it please your Honor, yesterday at the close of the trial you suggested an interest in the indebtedness of the stockholders of the A. Hamburger & Sons Corporation. We are willing to stipulate with respect to the items which have been reduced in value for the fair market value from the book value, which are under Item I, No. 1, and

under Item J, Nos. 1, 2 and 3, that those are four indebtednesses that were notes made by the stockholders for a term of 30 years, due in 1968, a rate of interest of two per cent; that for all intents and purposes the payments would be only the interest payments until the maturity of the note. The notes providing for certain payments, but for a reduction in those payments to zero in the event the income was changed, which, as we know, was changed in 1943 when the May Company lease expired.

We attempted to arrive at a fair market value of such a long term note with the Respondent and finally determined upon a discount of 25 per cent, thereby making the fair market value of those four items 75 per cent.

The other items are either short term notes, that is, five-year notes, or open accounts.

Your Honor will recall the testimony of both Mr. Mitchell and Mr. Milliken to the effect that the stockholders [229] and the company had an arrangement whereby the earnings were anticipated and they would withdraw moneys and then when the dividends were declared those accounts would be paid.

These open accounts are those anticipations, and those have been entered in the balance sheet for the fair market value at par.

The Court: That helps to clear up some of the queries I had in mind.

Perhaps in explanation of my remarks, I will say to you valuation cases are terrible headaches to me and sometimes they are very difficult, so I

like to advise you as to any queries I may have. In ten years of trying valuation cases I have found them rather difficult sometimes to resolve, and I like to get all the help I can. I am not trying to tell you gentlemen how to try your law suit.

Mr. Tonjes: Your Honor, I can't quite agree that I stipulated to all the remarks made by Mr. Blum. But I will say that we approached the problem of attempting to arrive at a fair market value somewhat along that line. We succeeded in agreeing that 75 per cent of the long term notes did represent a fair market value. To that extent I agree with Mr. Blum.

The Court: Very well. That is helpful to us.

Mr. Blum: You said you weren't quite clear as to the weight which the Petitioner or the Respondent was giving to the notes or just how the indebtednesses, or just how they [230] were treating it. If it would be helpful at this time I would state the Petitioner's view.

The Court: I would be glad to have you do so.

Mr. Blum: It is the Petitioner's view that of the total assets of the A. Hamburger & Sons, in the amount of some three and a half million dollars fair market value without the fair market value of the Hamburger Realty Company stock owned by them, that of that amount approximately \$2,100,000.00 is represented by the fair market value of these indebtednesses; the stockholders.

The Court: How much did you say?

Mr. Blum: Approximately \$2,100,000.00. Or in excess of 50 per cent. And of that amount the long

term indebtednesses will represent well over a million dollars. I beg your pardon. Will represent about \$600,000.00, approximately.

It is our position that a purchaser purchasing the stock which we have here would give great weight to the history of the borrowings by the stockholders, all of whom were members of the family and who would be in control of the corporation after the purchaser had purchased this stock and could continue their benefit, the same borrowing policy, without necessarily including the stranger to the family, who would be the purchaser of these stocks, in that borrowing arrangement. Also, he would have a fixed asset of approximately \$600,000.00 which would pay only the two per cent interest.

The of life being what they are he would give, I think, greater weight to the probability of the collection of those notes 30 years hence when we know that none of the makers of those notes—we know by mortality tables, I should say, none of the makers of those notes would be alive. Who would be the owners of their assets and what dissipation or appreciation of the asset values might have been made during that time would be very, very, in our opinion, problematical. We think the purchaser would give great weight to that, hence eliminating, to a great extent, his interest in the asset value of this stock.

That is briefly the Petitioner's position with respect to these indebtednesses.

The Court: I would be glad to hear Mr. Tonjes on the same point.

Mr. Tonjes: If your Honor please, the Respondent contends that insofar as the corporation is concerned the notes and the indebtedness in question of a value of at least 75 per cent, that there has been no showing that the notes were not secured and, as a matter of fact, I believe that the notes were secured by the stock of A. Hamburger & Sons, Inc. So, insofar as the corporation is concerned, it has an obligation due it which, in its hands they can't possibly lose on it. In other words, in the event that the maker of the note cannot pay, why, the corporation has that major stock in the corporation [232] as collateral, even though the rate be comparatively small, two per cent. In view of the fact it is absolutely 100 per cent secured, insofar as the corporation is concerned, it is not worthy of any serious discount or substantial discount.

The Court: I think you gentlemen, through this colloquy, have helped to clear up a few little hazy things I had in my mind. I didn't realize what you had done, how you had arrived at the 25 per cent discount. You have cleared it up very well for me. Thank you very much.

I didn't mean to try to tell you how to try your law suit, but to point out one thing I was a little foggy about.

Mr. Blum: We appreciate that.

Mr. Walker, will you resume the stand?

Whereupon,

THERON W. WALKER

resumed his testimony as follows:

Redirect Examination

By Mr. Blum:

Q. Yesterday, Mr. Walker, on cross examination you made reference to the common stock of the Central Investment Company, and as I recall you stated that from a hazy recollection back in 1941 the stock was selling at about eight or ten dollars a share. Did you check yourself on the stock of the Central Investment Company?

A. I have. [233]

Q. Will you now tell us what you found with respect to the Central Investment Company, what kind of stock it is, what its underlying assets are and what it was selling for, and dividends and so forth it was paying, and the earnings?

A. The Central Investment Company had at the end of 1940 total assets of \$9,165,000.00. The company owned the property at the southwest corner of Fifth and Olive, which ran through to Grand.

On that property it also owned the building, which is known as the Biltmore Hotel. There was outstanding against the assets mortgage indebtedness, which had been called just shortly before the basic date in this case, \$3,600,000.00 of bonds which were refunded. But the equity in the property which is comparable to, as near a degree as one can find, I believe, in a local situation, had a price range in 1941 of a high of 25 and a low of 95/8ths.

(Testimony of Theron W. Walker.)

The stock on the basic date was selling for approximately 20; 19½ bid, 20 offered. The company's earnings for the five years ending December 31, 1941, had risen from \$2.11 in 1937 to \$3.38 in 1941.

Mr. Tonjes: You mean a share?

The Witness: Per share. Any security analyst gives substantial weight to the trend of earnings, whether it be up or down or static. The average earnings for that period were \$1.56, so that it is apparent that the '41 results were substantially better than the average. The company had a book value at the end of 1941 per share of \$93.39. So at the then price of 20 it was selling for 21.5 per cent of its book asset value and for six times the 1941 earnings. The stock, as I say, represented the equity in that substantial property.

Q. The corner of Fifth and Olive is in downtown Los Angeles; is it not?

A. Yes, sir.

Q. And the Biltmore Hotel is known as one of the two best hotels in Los Angeles?

A. I believe it is considered the commercial hotel in Los Angeles.

Q. Now, you say the stock was selling for approximately six times the 1941 earnings; is that correct?

A. That is right.

Q. And that would give a yield of what?

A. You mean a dividend or capitalization factor?

Q. I think yesterday in testifying with respect

(Testimony of Theron W. Walker.)

to A. Hamburger & Sons you said you would use both a ten times earnings and a ten times yield.

A. No. Hamburger Realty that was.

Q. Seven times earnings and fourteen point yield.

A. I used a seven times earnings on A. Hamburger & Sons, which assumes a \$25.00 dividend, provided a yield of 14.3 per cent on the base price of the stock after deducting the [235] discounted value of the prospective large dividends from 1941 and 1942 earnings.

Q. Will you tell us with respect to the Central Investment Company the dividend paying policy of the company?

A. The company had been paying no dividends for several years, up until 1941 when it went on a dividend paying basis, which it has since paid a dividend at increasing rates.

Q. What were the dividends, do you have them?

A. The dividend for the most recent full year was 1944, and they paid \$4.50 per share.

Q. That is what yield on the then selling price?

A. Well, the yield on today's or yesterday's price, the stock is quoted 85 bid, the yield on a \$4.50 dividend would be 5.3 per cent.

Mr. Tonjes: You said yesterday. Do you mean 1945?

The Witness: Yes, yesterday, 1945.

Q. (By Mr. Blum): That compares how with the Dow Jones average of the same time?

(Testimony of Theron W. Walker.)

A. For the same day it would be some 43 per cent larger than the yield available now from the Dow Jones industrial average.

Q. Applying that 43 per cent excess for the Central Investment Company stock to the Dow Jones average, applying that percentage to the A. Hamburger & Sons dividends at the [236] basic date, what result would that show?

A. Well, if we apply that same ratio to the Dow Jones industrial average yield on the base date, the Central Investment Company stock would have been yielding, had it been paying, a dividend of 10.96 per cent.

Q. Now, Mr. Walker, yesterday you were questioned with respect to the character of the assets of A. Hamburger & Sons on cross-examination, with particular reference to the Government Bonds and the Jefferson and Grand Warehouse, which warehouse was under lease to the May Company. Will you tell us with respect to the indebtednesses of the stockholders to the corporation how you analyzed those assets with respect to the value of the stock?

A. I gave considerable weight to the character of the assets. A. Hamburger & Sons had in cash in U. S. Bonds about \$749,000.00, according to the book value. The fair market value was somewhat higher. It also had certain other marketable assets, namely, the Los Angeles City High School Bonds and three or four marketable common stocks whose book value was \$209,000.00 and the fair market

(Testimony of Theron W. Walker.)

value was about equal. Against those liquid assets there was a current liability total of \$555,000.00. Thus the overage represented about 10 per cent of the total assets of the company.

On the other hand, the book value of the notes was \$2,344,000.00 and the fair market value was about \$2,100,000.00, [237] or not quite two-thirds of the total net worth at fair market values.

Any purchaser would be very much interested in the character of the assets. Any buyer who would have the money to invest in a block of stock would be pretty shrewd and would also realize what has gone forth in the past might take place in the future. He would also look at the situation such as I mentioned yesterday, a listed investment trust whose business is the ownership of liquid securities.

I can mention here the Lehman Corporation. It has no prior obligations. It is listed on the New York Stock Exchange as of June 30, 1941, 12.71 per cent of its total assets were in cash and Government Bonds. And it had a net asset value of \$28.77. Its market price was at the 1941 low 66 per cent of the June 30th asset value. The 1941 average price was 75 per cent of its June 30, 1941 price. Therefore, a buyer who was interested in liquidity and in a responsible management would have that as a measure of comparison of the character of assets.

Q. Did the Lehman Company have large loans out to its stockholders, a balance sheet showing such loans?

(Testimony of Theron W. Walker.)

A. To my knowledge, it had no such loans. I believe that would be contrary to its business practice.

Q. Is the Lehman Investment Trust a substantial investment trust? [238]

A. I think its assets ran in the twenty millions.

Q. As an investment in stocks of an investment company or investment trust, is it highly regarded in the investment field?

A. The management of the company is largely that of Lehman Brothers and their financial reputation is regarded very highly, and their financial ability.

Q. With respect to the Hamburger Realty Stock, Mr. Walker, what type of a purchaser would you think would be required? That is, one purchaser for the whole block or several purchasers for a few shares?

A. In my judgment, the most likely buyer would be a person or an institution of substantial funds, and they would be interested in the block, not in small pieces of a block.

Q. From your experience in the investment field, is a single purchaser of a substantial block apt to go into the character of the security more or less than purchasers of small share lots?

A. My experience, extending over a good many years, I found an institutional buyer or a man of means a very sharp purchaser; much more so than the individual of a medium sized income.

Q. In your opinion, such a purchaser would go

(Testimony of Theron W. Walker.)

deeply into the earnings, dividends payable policy and character of the assets and such items and factors of policy as you have mentioned?

A. Very definitely. And in addition he would take into consideration the conditions of the times that were then affecting all investments.

Q. In preparing yourself to testify in this matter, Mr. Walker, can you tell us approximately how much time you spent?

A. I would say it ran somewhat over three days.

Mr. Blum: That is all.

Recross-Examination

By Mr. Tonjes:

Q. Mr. Walker, describe this Lehman Trust—do you call it?

A. It is Lehman Corporation. It is an investment trust.

Q. It is a corporation?

A. It is a corporation.

Q. Sells shares of stock?

A. No. At one time it sold shares of stock, yes. But it is a closed capitalization, as we speak of it, similar to the Hamburger Realty.

Q. These interests you stated sold at certain prices. What were they?

A. They were outstanding common shares of the company.

Q. They were capital stock?

A. They were capital stock listed on the New York Stock Exchange. [240]

Q. What sort of properties did Lehman Bros. own?

(Testimony of Theron W. Walker.)

A. Largely marketable materials.

Q. What was the majority of the holdings, industrials and rails?

A. Rails, utilities and oils.

Q. Did they have any holdings stock?

A. Yes.

Q. Mostly strictly commercial institution?

A. That is right.

Q. Going back to the Central Investment Company, do you know when the Central Investment Company was organized?

A. No, I do not.

Q. Do you know when it acquired the property known as the Biltmore Hotel property?

A. As to the definite date I do not, sir. I believe it was approximately the date of the—around 1923 would be an approximation.

Q. Did the Central Investment Company own any other property, do you know?

A. Not to my knowledge, except the property that went into the operation of the hotel; that is, the fixtures.

Q. Do you know the circumstances under which they acquired that property? Did they buy it for cash?

A. I don't know.

Q. Do you know whether or not there were any encumbrances [241] on the property when they acquired it?

A. I don't know.

Q. Do you know whether it was a result of a reorganization due to the financial embarrassment of the company who owned it?

(Testimony of Theron W. Walker.)

A. There was a change in the lessor in the late '30's.

Q. What do you mean the lessor? Who owned it prior to the time——

A. The Central Investment Company owns the property.

Q. Who owned it prior to the Central Investment Company?

A. That I do not know. They may have owned it during its entire life.

Q. Do you know whether or not the Biltmore Hotel or its operators were engaged in any financial difficulty at or about the time the Central Investment Company acquired it?

A. I don't know they were.

Q. Do you know whether they acquired it in a straight transaction, that is, buyer and seller meeting, or was it the result of some reorganization?

A. I don't believe that—so far as I know they have been in no financial difficulties.

Q. Who?

A. The Central Investment Company.

Q. Do you know what the amount of encumbrance was?

A. Yes; \$3,607,000.00. [242]

Q. Do you know whether that covers both the building and the fee and the land?

A. It covered both the fee and the land.

Q. Do you know what the rate of interest is on that obligation?

(Testimony of Theron W. Walker.)

A. In 1941 the rate was six per cent.

Q. Six per cent?

A. Bond was due in 1957.

Q. The total sum of the obligation was about

how much? A. \$3,607,000.00.

Q. The owners of the common stock would have an interest in the equity over and above the \$3,607,000.00?

A. That is right. They had the equity of the property.

Q. Do you know whether there are any other obligations, second mortgages or any liens of any type or description?

A. I don't believe there were, sir.

Q. Did you make an investigation about that?

A. I looked, but I would hesitate to rely on my memory at this time.

Q. Who operated the hotel prior to the time that the Central Investment Company took it over, if anyone did?

A. I believe the Central Investment Company operated it.

Q. They operated it themselves?

A. I believe so. [243]

Q. Do you know how long they operated it?

A. No, sir.

Q. Do you know who was operating it in 1941?

A. Yes; Baron Long.

Q. Do you know how long he operated it?

A. Since 1938.

Q. About 1938? A. Yes.

(Testimony of Theron W. Walker.)

Q. Do you know the circumstances under which he took over the operation?

A. As I say, the preceding lessor had failed to meet their obligations and Baron Long made the lease with the Central Investment Company.

Q. Do you know what the earnings of the Central Investment Company were for the years 1939, 1940 and 1941?

A. On a per share basis, yes, sir.

Q. What were they?

A. In 1939 it was 61 cents. 1940, \$1.33. \$3.36 in 1941.

Q. Do you know what the stock was selling for during those same years?

A. The range in 1941 was a high of 20 and a low of $9\frac{5}{8}$ ths. The price range for the preceding years was somewhat less than that.

Q. What year are you giving me there? [244]

A. 1941.

Q. That was between roughly, we will say, 10 and 20?

A. The low was $9\frac{5}{8}$ ths; the high was 20.

Q. Do you know what it was for the years 1939 and 1940?

A. No, not precisely. It was less than that.

Q. Assuming, Mr. Walker, that the loans to the stockholders, that is, the long term loans were secured by the stock of A. Hamburger & Sons, would you say that that was a well secured loan?

A. That would depend on the value that was finally determined for the stock of A. Hamburger & Sons.

(Testimony of Theron W. Walker.)

Q. In the event that the obligator did not pay the corporation would not be any longer indebted to the stockholder as a stockholder; would he? That is to say, the corporation would then have the right to keep the stock and perhaps cancel it.

Mr. Blum: Objected to as asking for a legal opinion.

The Court: I think the objection perhaps is well taken.

Mr. Blum: If Mr. Tonjes wishes to reframe it in some way to bring out the same idea, without the legal opinion, all right. If he will put the legal opinion in the question and interpret it for him——

Mr. Tonjes: It is not too important. That is all, Mr. Walker. [245]

Redirect Examination

By Mr. Blum:

Q. Mr. Walker, was the principal income of the Central Investment Company rentals from its lease to either Baron Long or his predecessor?

A. Yes, sir.

Q. In respect to the values which you have given, the opinions as to the values you have given, both as to the Hamburger Realty and the A. Hamburger & Sons, have you assumed that the seller of the stocks would be holding out for as high a price as he could get and would be just as shrewd a seller as the purchaser would be a purchaser?

A. I have tried to set what is known as a fair market price, which, to my mind, means that the

(Testimony of Theron W. Walker.)

seller is as well informed and as shrewd as the buyer, and they are both willing to meet at some fair price.

Mr. Blum: That is all.

Mr. Tonjes: No further questions, Mr. Walker.
(Witness excused.)

Mr. Blum: At this time, if your Honor please, the Petitioners are through with their case, with the exception of offering into evidence the amended petition to conform to the proof which was referred to yesterday at the beginning of the trial. We would like to offer those at this time. [246]

The Court: Very well.

Mr. Tonjes: You don't mean to offer them in evidence? To file them?

Mr. Blum: No; to file them.

Mr. Tonjes: No objection.

The Court: They may be handed to the clerk and they may be filed.

Mr. Blum: May the record show that I am handing the Respondent a copy?

The Court: Very well.

Mr. Blum: For the purposes of the answer, do you wish to stipulate your answer heretofore to the original may be deemed to go to the amended petition, Mr. Tonjes?

Mr. Tonjes: I would prefer to file a separate answer, your Honor, for the record.

The Court: Within what time will you probably offer it, Mr. Tonjes?

Mr. Tonjes: Ten days will be sufficient. I will

try to get it here before the Court leaves; I think I can.

The Court: If you do, it is all right. If you do not, you may send it into Washington.

Mr. Blum: May we have a short recess before the respondent starts its case?

The Court: Very well. We will suspend for a brief recess.

(A short recess was taken.) [247]

Mr. Blum: May it please the Court, may I withdraw our submission on our side and put Mr. Walker on for just one or two questions?

The Court: You may.

Whereupon,

THERON W. WALKER

recalled as a witness for and on behalf of the petitioner, having been previously duly sworn, was further examined and testified as follows:

Further Direct Examination

By Mr. Blum:

Q. Mr. Walker, is it necessary in the State of California for an investment counselor to be licensed by the State of California? A. Yes, sir.

Q. Are you so licensed?

A. Yes, sir, as a broker.

Q. Is it necessary in the State of California for a brokerage firm or stock broker to be licensed?

A. Let me correct that previous answer. We are licensed to do business as a broker, which permits us to do business as an adviser.

(Testimony of Theron W. Walker.)

Q. Is it necessary for brokerage firms or individual brokers to be licensed in the State of California? A. Yes, sir.

Q. Is your firm licensed as a broker? [248]

A. Yes, sir.

Q. Is each individual member so licensed, also?

A. Each person, each employee who is dealing with the public is so licensed.

Q. Without such a license, you cannot deal in securities as a broker with the public?

A. No, sir.

Q. What licenses do you have, Mr. Walker?

A. Broker's license.

Q. Broker's license? A. Yes.

Q. For the State of California?

A. Yes. The firm is also registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940. We have been registered since the Act was put into effect.

Q. And licensed in the State of New York?

A. I presume so. We have a New York office and a New York partner.

Q. You have not checked on that?

A. No.

Q. Is there any license required with respect to the New York Stock Exchange, or permission to act?

A. Well, in order to do business on the New York Stock Exchange, you must be a member of that Exchange, which requires [249] the purchase of a membership and the payment of dues thereon.

(Testimony of Theron W. Walker.)

Q. Do you have any other licenses besides the broker's license in the State of California?

A. Personally?

Q. Yes. A. Not to my knowledge.

Q. What investment services do you or your firm take and have taken over a period of years for research?

A. Of the publicly available services we take Standard Statistics, Standard and Poor's Corporation and the Moody Manuals, which cover the various industries and their stock and bond letters, weekly.

Q. For approximately how many years have you had access to and studied these services?

A. About 20 years. In addition to these services, I might say that the firm employs two other organizations who are in the business of supplying private statistical information.

Q. You have access to those reports and their findings personally? A. I do.

Q. And the reports and manuals which you have mentioned are considered to be the outstanding ones in the investment field? A. Yes, sir. [250]

Mr. Blum: That is all.

Mr. Tonjes: That is all, Mr. Walker.

(Witness excused.)

Mr. Blum: The petitioner rests.

EVIDENCE ON BEHALF OF RESPONDENT

Thereupon, the respondent, to maintain the averments on his behalf, introduced the following proof:

Mr. Tonjes: If your Honor please, at this time respondent offers in evidence the estate tax returns of Belle Alice Hamburger Nathan, to be received in this proceeding.

The Court: It may be handed to the clerk.

Mr. Blum: No objection.

The Court: It may be received as respondent's exhibit B.

(The return referred to was marked and received in evidence as respondent's exhibit B.)

The Court: I think we marked as A a decree, which has not been received in evidence. Is that correct?

Mr. Tonjes: I have that before me now, your Honor. My recollection is I asked that it be marked for identification. But the decree which was identified by Mr. Mitchell is marked for identification and also marked admitted in evidence. I now offer the document in evidence.

The Court: I think probably the marking as received in evidence may have been in error. We will receive it in [251] evidence, as respondent's exhibit A.

(The decree referred to was previously marked for identification, and received in evidence as respondent's exhibit A.)

[Respondent's exhibit A appears on pages 313 to 351.]

Mr. Tonjes: Respondent offers in evidence a document which purports to be a promissory note of the David A. Hamburger Corporation, signed by David A. Hamburger, and the document is dated January 1, 1938, and is in the sum of \$673,578.90. That is one of the loans on the balance sheet, if your Honor please.

The Court: There being no objection, it will be received as respondent's exhibit C.

(The note referred to was marked and received in evidence as respondent's exhibit C.)

[Respondent's Exhibit C appears on pages 352 to 357.]

Mr. Tonjes: Might I correct the previous offer, your Honor, and state that it is a photostatic copy?

Respondent offers in evidence a photostatic copy of what purports to be an obligation to pay the sum of \$66,027.85, which is dated January 1, 1939, and is signed by Belle A. H. Nathan.

The Court: It may be received as respondent's exhibit D.

(The obligation referred to was marked and received in evidence as respondent's exhibit D.)

[Respondent's exhibit D appears on pages 357 to 362.]

Mr. Tonjes: Respondent offers in evidence photostat [252] copy of what purports to be a note in the sum of \$150,899.40, dated January 1, 1936, and bearing the signature of Jennie H. Marx.

The Court: It may be received as respondent's exhibit E.

(The note referred to was marked and received in evidence as respondent's exhibit E.)

[Respondent's exhibit E appears on pages 363 to 368.]

Mr. Tonjes: Respondent offers in evidence what purports to be a promissory note dated January 1, 1938, in the amount of \$98,736.80, and it is signed by Evelyn Hamburger.

The Court: It may be received as respondent's exhibit F.

(The note referred to was marked and received in evidence as respondent's exhibit F.)

[Respondent's Exhibit F appears on pages 369 to 374.]

Mr. Tonjes: Let the record show the last document is also a photostat copy, your Honor.

I will call Mr. Allen to the stand, please.

Mr. Smith: If your Honor please, I was hoping our case would finally be closed. It is my error. I had inquired of Mr. Walker of certain things and I didn't impart it to my associate counsel who examined him. I wonder if we could ask him one more question?

Mr. Tonjes: No objection.

The Court: Very well. [253]

Whereupon,

THERON W. WALKER

recalled as a witness for and on behalf of the petitioner, having been previously duly sworn, was further examined and testified as follows:

Further Direct Examination

By Mr. Smith:

Q. I will ask you if you are registered or licensed by the New York Stock Exchange?

(Testimony of Theron W. Walker.)

A. Yes, each employee of the New York Stock Exchange firm in order to take orders from the public must pass an examination, written examination as to his investment experience and knowledge, ability to analyze statements of corporations and it also involves the man's character and record.

Q. You passed that examination?

A. I passed that examination.

Q. And are so registered?

A. So registered.

Q. Over what period of years?

A. Since January, 1940.

Q. January 1940? A. Yes.

Mr. Smith: That is all. Any cross-examination, Mr. Tonjes?

Mr. Tonjes: No. That is all.

(Witness excused.)

Mr. Tonjes: Mr. Allen, will you take the stand?

Whereupon,

EDWARD H. ALLEN

called as a witness for and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you please state your full name for the record?

The Witness: Edward H. Allen.

Q. (By Mr. Tonjes): Where do you live, Mr. Allen? A. Los Angeles.

(Testimony of Edward H. Allen.)

Q. How long have you lived here?

A. 58 years.

Q. What is your business at the present time?

A. Appraiser.

Q. In that connection, what type of properties do you appraise?

A. All types of real estate and practically all types of personal property.

Q. Does that include securities, corporate stocks and things of that nature? A. Yes, sir.

Q. You are an attorney, Mr. Allen?

A. Yes, sir. [255]

Q. You are admitted to the bar to practice in the State of California? A. Yes, sir.

Q. Since when? A. 1909.

Q. Will you please state in a general way your educational background?

A. I attended the common schools here. In 1906 I entered the University of Southern California, College of Law, and was graduated from that institution in 1909 and was admitted to practice in the State Courts and also in the Federal Courts. And I am still a licensed attorney.

Q. In that connection, have you in your business as an appraiser ever appeared in any of the local courts and testified as an expert? A. Yes, sir.

Q. What was that in connection with, the appraisal of securities, that is, stocks of corporations?

A. Yes, sir.

Q. And also of real property?

A. Yes, sir.

(Testimony of Edward H. Allen.)

Q. Well, could you tell us in a general way what that has consisted of and what courts you have testified in?

A. Both in the State Courts and the Federal Courts, and before the Board of Tax Appeals. [256]

Q. Have you also had occasion to appraise the value of corporate stocks in closed corporations?

A. Yes, sir.

Q. Have you appraised the stocks of closed corporations which were primarily real estate holdings?

A. Yes, sir.

Q. Did you ever have any connection with the State Board of Equalization? A. Yes, sir.

Q. Just what was that connection? First, what is the State Board of Equalization?

A. Well, that is a division of the State of California and consists of a commission and has many duties, but one of their duties is to have general State supervision over county assessors throughout the State. I was employed with them for a period of eight years to see that the fair market value of real estate in this locality was consistent. That is, that the taxpayer owning, say, a commercial property wasn't paying any more taxes per dollar of market value than the man that owned a home or the man that owned an industrial property or the man that owned farm property.

Q. Were you ever employed by the State Corporation Commissioner? A. Yes, sir.

Mr. Smith: If your Honor please, I assume this is an [257] examination for qualifications. I

(Testimony of Edward H. Allen.)

haven't ascertained an answer yet that would indicate the witness possesses any qualifications. There is no date involved. We haven't had a date from this witness. Here is the State Board of Equalization; that happened 15 years ago. It might not give this witness any qualifications here at all as to the basic date.

I assume we will make an objection to his testimony, his testifying here because of absence of qualifications. I was wondering how your Honor——

The Court: I take it there is no objection at this time to any question which is pending; is there?

Mr. Smith: Beg pardon?

The Court: You are not at this time, are you, objecting to any question?

Mr. Smith: No. I felt it might simplify the matter, unless I can have the privilege of taking him on voir dire to bring out some of the dates that might be helpful.

The Court: At the proper time you may, if you desire, after the qualifying questions have been asked the witness, go into his qualifications and examine him on voir dire. You may do so at the proper time.

Mr. Smith: I appreciate that.

Q. (By Mr. Tonjes): How long have you been acting as an appraiser, Mr. Allen? [258]

A. For over 30 years.

Q. Were you so engaged in the last 15 years, 1930 to 1945 continuously?

A. I have been for over 30 years continuously an appraiser.

(Testimony of Edward H. Allen.)

Q. When were you employed or when did you have this connection with the State Board of Equalization? A. About 1924.

Q. How long did that continue?

A. For eight years.

Q. When were you connected with the State Corporation Commissioner?

A. Oh, from the period 1925 to 1940.

Q. What was the general nature of your duties there?

A. Appraising properties on which the owners of the properties intended to issue securities.

Q. Were you ever employed by the State Superintendent of Banks? A. Yes, sir.

Q. About what years?

A. From about 1924 or '25 to 1933 or '34.

Q. What were your general duties there?

A. Appraising properties that were held in trust by State Banks for various purposes, generally when they desired to sell the property, trade the property or exchange the [259] property for other assets.

Q. In that connection did you appraise and place a value upon corporate securities?

A. No, I was appraising the real estate.

Q. The real estate? A. Yes.

Q. Have you been employed by the City of Los Angeles? A. Yes, sir.

Q. When was that?

A. From about 1927 or 1928 until 1932 or '33; a period of about five years.

(Testimony of Edward H. Allen.)

Q. Your duties there were what, Mr. Allen?

A. Appraising real estate in what is known as the major traffic plan, opening and widening of the major arteries in the city, like Broadway, Wilshire Boulevard, Figueroa Street, Washington Street, Olympic Boulevard and Tenth Street, and others.

Q. Were you ever employed in connection with any of the work in the local Probate Courts?

A. Yes, sir. I started probate appraising—I did a little of it in 1909. In 1914 I was appointed a regular Probate Court appraiser in this county. I received approximately 35 appointments per month, that is, I was appointed to appraise 35 estates a month. I continued in that work for a period of 14 years. In that length of time I appraised between five and six thousand estates.

Q. In that connection did you appraise corporate securities and stocks?

A. Appraised all the assets that were in the estate.

Q. Did that include common stocks of corporations?

A. All kinds of stocks and securities, and interest.

Q. Family holding corporations?

A. Yes, sir.

Q. Did some of those family holding corporation assets consist primarily of real estate?

A. Yes, sir.

Q. Were you ever employed by any of the local banks or trust companies?

(Testimony of Edward H. Allen.)

A. Yes, sir, I have been employed by all the local banks over a period of the past 25 years.

Q. In what capacity?

A. Appraising assets, securities, real estate.

Q. Will you name a few of them, please? I don't think it is necessary, Mr. Allen.

Mr. Allen, have you been employed to make an appraisal and a determination of your opinion with respect to the fair market value on October 13, 1941, of certain shares of the capital stock of the Hamburger Realty Company and A. Hamburger & Sons, Inc., which was owned by Belle Alice Hamburger Nathan on October 13, 1940, as of October 13, 1941?

A. Yes, I have.

Q. Did you make certain inquiries and examinations in connection with that matter?

A. Yes.

Q. Have you arrived at a conclusion?

A. Yes, sir.

Q. Mr. Allen, I have just handed you the stipulation of facts in this case, which has attached to it Exhibits numbered 1 to 9, inclusive, and I ask you if you were furnished with a copy of that stipulation and copies of all of the exhibits which are attached thereto?

A. Yes, sir.

Q. Have you made a study of that stipulation and all of the exhibits?

A. Yes, sir.

Q. Are you familiar with their contents?

A. Yes, sir.

Q. Now, you have stated that you have reached a conclusion with respect to the fair market value of the capital stock of the Hamburger Realty Com-

(Testimony of Edward H. Allen.)

pany. Would you please tell the court, in a general way, what factors you considered in arriving at your conclusion?

A. I took into consideration, in arriving at that conclusion, all the information that is contained in these exhibits as to the history of the corporation, as to its assets. [262] I took into consideration the history of the assets in this area, which I have known as an appraiser over 30 years, that is, the real estate holdings of the concern. I took into consideration the securities they owned. I have known the history of those companies as long as I can remember, or as long as they have been in existence, I might say.

I took into consideration the tenancy of their main property, that is, the May Company. I took into consideration all my experience in appraising securities of this type, that is, what you call a closely held or a family holding corporation or a corporation in which there are only a few stockholders, plus all my experience in appraising properties of this type.

Q. Did you take into consideration the earning capacity of the corporation, as set forth in the stipulation?

A. I did. I gave a great deal of consideration to the earnings of the corporation over its lifetime.

Q. Did you also give consideration to the anticipated profits the corporation might reasonably expect?

A. I took into consideration those factors, yes, sir.

(Testimony of Edward H. Allen.)

Q. You took into consideration the past record of the corporation?

A. Yes, sir. And the corporations in which they own securities, also.

Q. Did you also take into consideration the value of [263] the underlying assets? A. Yes, sir.

Q. You might state, Mr. Allen, how you interpret the phrase "underlying assets."

A. Underlying assets, in a corporation of this character, is the value of the securities that they own, the value of the real estate they own, less any indebtedness against them; what you might call the net worth or the net fair value of the securities or the real estate.

Q. You also took into consideration the actual value of the underlying assets; did you?

A. Yes, sir.

Q. Did you take into consideration the dividends paid by the corporation over a period of years? A. Yes, sir.

Q. Did you take into consideration whether the corporation was engaged in business or was primarily a holding company? A. Yes, sir.

Q. Did you take into consideration whether the corporation was in the process of liquidation or might be reasonably expected to continue its activities indefinitely? A. Yes, sir.

Q. Did you take into consideration the general market conditions? [264] A. Yes, sir.

Q. The management? A. Yes, sir.

Q. And whether or not the block of stock being

(Testimony of Edward H. Allen.)

valued is a minority interest? A. Yes, sir.

Q. Whether the stock is in a closed corporation?

A. Yes, sir.

Q. Did you take into consideration that both Federal and State taxes would have to be paid on the earnings? A. Yes.

Q. And on the property? A. Yes, sir.

Q. Well, what else did you consider in arriving at your conclusion, Mr. Allen?

A. I believe that states practically all the things that were taken into consideration in arriving at this opinion.

Q. In arriving at your determination of the fair market value of the stock in question, have you been influenced to any extent by the determination of the value made by the Commissioner of Internal Revenue with respect to this stock?

A. No, sir.

Q. I gather, Mr. Allen, that you weighed all the facts which are contained in the stipulation and the exhibits attached? [265] A. Yes.

Q. And in accordance with your general experience gathered not only in this case, but over the years by you personally, and took into consideration all of the other elements with respect to which you have testified, and on the basis of such facts have reached an opinion with respect to the fair market value of the shares of the capital stock of the Hamburger Realty Company owned by Belle Alice Hamburger Nathan on October 13, 1940, as of October 13, 1941? A. Yes, sir.

(Testimony of Edward H. Allen.)

Q. Will you please tell the court what your opinion is?

Mr. Blum: Objected to as incompetent, irrelevant and immaterial. The witness has not shown qualifications to express an opinion on stock. Generally he has stated only with respect to stock that he has valued, some stocks for the State of California, as a probate appraiser from 1914 to 1928. He has never appraised, while employed by the City of Los Angeles any stocks. For the State Banking Commissioner it was real estate only. The State Department of Corporations, it was appraising properties on which securities were to be issued, not the securities themselves. The Board of Equalization it was to see that values were equalized. That is, real estate values.

He has not shown any qualifications to do any appraisal work except of real estate. We object to the answer [266] to the question.

The Court: Your objection will be overruled. I think I would like to ask one or two questions.

First, I don't know whether I followed counsel's question correctly. Are you now addressing your questions to the Hamburger Realty Company or to the A. Hamburger & Sons, or to both? Did I follow you?

Mr. Tonjes: No. The Hamburger Realty.

The Court: You are just addressing it to the Hamburger Realty Company?

Mr. Tonjes: That is correct, your Honor, yes.

The Court: I may have overlooked what you

(Testimony of Edward H. Allen.)

were saying in your examination. Now, one other question. Were you present throughout the trial of this particular case and did you hear Mr. Mitchell and Mr. Sparks and Mr. Milliken and the other gentlemen testify?

The Witness: Yes, your Honor.

The Court: What has been your experience in examining stocks generally of corporations?

The Witness: Well, as I stated, for 14 years I was a regularly appointed Probate Court appraiser.

The Court: For what purpose did you appraise stocks, if any, in that connection?

The Witness: In that connection we often had an estate where it was a family holding corporation of only three [267] or four or five members, and that corporation owned real estate, it owned stocks and it owned bonds and it had interests in other corporations.

We had to appraise the assets, had to appraise the real estate, had to appraise stock, had to appraise everything that was in that corporation.

The Court: For what purpose?

The Witness: To determine what the minority interest was worth. For instance, the Times-Mirror Company here, one of the largest corporations in town, we often had estates that had five or ten shares of stock in that corporation.

The Court: It is my opinion the witness is shown qualified to express an opinion. I will overrule the objection.

(Testimony of Edward H. Allen.)

Mr. Smith: May we take him on voir dire before he answers that question?

The Court: You may.

Mr. Smith: Mr. Allen, as I understand, you went from high school directly into law school?

The Witness: Yes, sir.

Mr. Smith: You had no pre-law in college?

The Witness: No, sir. There was no such thing in 1906 as that.

Mr. Smith: They had such a thing, but it wasn't required at that time. It wasn't required, is that what you mean? [268]

The Witness: No. There was no institution I know of in 1906 that had any pre-anything.

Mr. Smith: They had an A.B. Degree, didn't they? And an A.M. Degree, which would equip you and give you a foundation for your law at that time?

The Witness: Yes, sure. The more education you have the better off you are, to start anything. They didn't have any pre-training in my time.

Mr. Smith: You are not licensed in the investment field in any way?

The Witness: No; I am a licensed real estate broker, that is all.

Mr. Smith: When did you cease practicing law?

The Witness: After the first war. I took up this appraising in 1914. I had a little practice until the war. I went into the Army and when I went in the Army I didn't attempt to practice law again.

(Testimony of Edward H. Allen.)

Mr. Smith: You haven't practiced law since 1920?

The Witness: 1919.

Mr. Smith: As a probate appraiser you functioned in conjunction with an inheritance tax appraiser?

The Witness: There were two Probate Court appraisers and one inheritance tax appraiser.

Mr. Smith: You were never an inheritance tax appraiser? [269]

The Witness: No.

Mr. Smith: At that time you did not play any part in the completion of the inheritance tax reports on estates?

The Witness: No.

Mr. Smith: So during that period you made no appraisals for tax purposes?

The Witness: Well, they were all—all our appraisal taxes were based on that, attorneys' fees, executors' fee; that was the purpose of it.

Mr. Smith: They had inheritance tax hearings, did they not, that you had nothing to do with and wasn't that for the determination of the tax, and that the appraiser, the inheritance tax appraiser that acted with you that was entirely his duty?

The Witness: Yes, it was based on the appraisal I put on it.

Mr. Smith: Sometimes it was.

The Witness: I never knew it to vary once or twice in five thousand cases.

Mr. Smith: You don't know that during that

(Testimony of Edward H. Allen.)

time many objections were filed to inheritance tax reports, that were prepared and filed by the inheritance tax appraiser alone?

The Witness: Oh, sure, there are always objections.

Mr. Smith: You played no part in the inheritance tax report, I think you said. [270]

The Witness: I had nothing to do with that angle of it.

Mr. Smith: From that time, 1914 to 1928, was it not the uniform policy of the appraisers, where you had stock in a closed corporation, to merely look at the underlying assets and apportion them among the stockholders, and that was your answer?

The Witness: Apportion them among the stockholders?

Mr. Smith: To get the value of the stock, I mean.

The Witness: We had to appraise the stock because that was in the estate.

Mr. Smith: The stock of a closed family corporation?

The Witness: We appraised all the assets.

Mr. Smith: I am not asking you that question at all.

The Witness: Pardon me.

Mr. Smith: Confine your answer to assuming that is a closed family corporation stock in the inventory similar to that of the Hamburger Realty Company or the A. Hamburger & Sons, and there was a 10 per cent interest represented of the issue

(Testimony of Edward H. Allen.)

in outstanding stock in the inventory; didn't you appraise, merely go and take the value of the underlying assets and apportion them, 10 per cent of them on your inventory of the value of that stock? Wasn't that instructions you carried out? [271]

The Witness: No, sir. Nobody ever instructed me at any time how to appraise property in that work.

Mr. Smith: I am asking did you do it that way?

The Witness: No.

Mr. Smith: Wasn't it uniformly done that way?

The Witness: No, never.

Mr. Smith: How did you make your appraisals in probate at that time?

The Witness: When we had a closed corporation we appraised all its assets, all the assets of the corporation and deducted the liabilities, if any, and put a value upon each share of stock. If the estate had five shares or ten shares, that was the value, the market value we arrived at at all times.

Mr. Smith: That is right. Now, let us confine your answers, please, to what your experience and your activities as a broker or as an appraiser were from 1939 until this time.

The Witness: 1939?

Mr. Smith: Yes. Just say January 1, 1939. What appraisals have you made since January 1, 1939, for the Corporation Commissioner of this State?

The Witness: I don't know right down to dates. If you will take two or three years subsequent to that—I don't recall any. [272]

(Testimony of Edward H. Allen.)

Mr. Smith: I mean from 1939, you don't recall any appraisal you made for the State Corporation Commissioner?

The Witness: No.

Mr. Smith: For the Banking Commissioner of this State?

The Witness: No.

Mr. Smith: None?

The Witness: No.

Mr. Smith: For the Board of Equalization?

The Witness: No.

Mr. Smith: None. What case have you appeared and testified in in relation to taxes since 1939?

The Witness: I don't understand "taxes."

Mr. Smith: Where taxes were involved. To determine a value in taxes, we will put it that way; for tax purposes.

The Witness: Since 1939?

Mr. Smith: Yes.

The Witness: Well, as I recall, in that matter—you mean matters like this?

Mr. Smith: Yes, matters of this type.

The Witness: I think only before this court is the only court I have been in, the Board of Tax Appeals.

Mr. Smith: Were you in this court in the Los Angeles Stock Exchange case?

The Witness: Yes. [273]

Mr. Smith: You testified in that case?

The Witness: Yes.

(Testimony of Edward H. Allen.)

Mr. Smith: Did you testify for the Government in that case?

The Witness: Yes, sir.

Mr. Smith: Do you know of any other cases where you testified?

The Witness: In 1939?

Mr. Smith: Yes.

The Witness: Yes, I have been in four or five of them, but I forget what they were now. I don't think there is a year since 1934 that I haven't been employed by the Government as an appraiser.

Mr. Smith: So you think you have testified before the Board of Tax Appeals or the Tax Court on questions of value once a year?

The Witness: I would say so. I don't recall whether I have been employed by the Treasury Department. Many times where it never went to the court, you know.

Mr. Smith: I mean testifying, to appear to testify.

The Witness: I think pretty near every year; there might be one year in there I didn't.

Mr. Smith: Last year what case did you testify in, or the year before?

The Witness: I can't recall now. [274]

Mr. Smith: You don't remember?

The Witness: Remember that case Mr. Crouter had?

Mr. Smith: That was the Los Angeles Stock Exchange that Crouter had.

The Witness: Yes.

(Testimony of Edward H. Allen.)

Mr. Smith: That was this year.

The Witness: Was that this year?

Mr. Smith: That was in February of this year.

The Witness: I don't recall the others now.

Mr. Smith: Now, in these cases in which you have testified since 1939, did you testify in any of them in relation to the value of a corporate stock?

The Witness: No, they were all, as I recall it, real estate values.

Mr. Smith: They were all real estate?

The Witness: Yes.

Mr. Smith: And you held yourself out in those cases as being entirely, confining your time and attention to appraisal of real estate; did you not?

The Witness: You mean I conveyed that impression?

Mr. Smith: Yes, sir.

The Witness: I wouldn't say that.

Mr. Smith: You wouldn't say that?

The Witness: I was just questioned about my experience in appraising real estate. I wasn't qualifying as [275] a stock expert in that case.

Mr. Smith: Well, you were asked—I will show you what purports to be the official record of the proceedings of the United States Tax Court in the case of Los Angeles Stock Exchange Building; the Petitioner vs. Commissioner of Internal Revenue, Docket No. 2899.

I will ask you to examine particularly pages 283, where your testimony began, and 284. I would like to question you, if I may, relative to your answers .

(Testimony of Edward H. Allen.)

to questions there concerning your qualifications.

The Witness: Yes, sir.

Mr. Smith: Did you at that time under oath give the following answers to this question:

“Q. What have you chiefly been doing since the last war? You mean the first World War? World War 1.” That is the question.

“A. Yes, I have been devoting all my time to real estate appraising.”

The Witness: Yes, sir. Would you let me read the other answer, though?

Mr. Smith: Yes, I want you to read anything you want.

The Witness: “In the year 1914 I was appointed a regular Probate Court appraiser in this County.” That is where I tell about appraising securities.

Mr. Smith: That was away back in 1914 to 1928.

The Witness: Yes, but if you read it all it goes down to the present time.

Mr. Tonjes: What page is that?

Mr. Smith: I will ask you to read out of there what you want, what you can read that will harmonize with this other answer.

The Witness: “Will you tell us in a general way what that has consisted of and to what courts or in connection with what case that related to?”

“A. In the year 1914 I was appointed a regular Probate Court appraiser in this County. I received approximately 35 appointments each month to appraise all the assets in the estates of deceased persons. I continued in that work for 14 years. In

(Testimony of Edward H. Allen.)

that time I appraised between five and six thousand estates and properties of all kinds and descriptions scattered all over Los Angeles County and throughout Southern California."

Mr. Smith: Therefore, you think that qualifies your answer, that "Yes, I had been devoting all my time to real estate appraising"?

The Witness: Certainly. Real estate appraising takes in everything. I have to find out what the real estate is worth before I can tell you what the stock against it is worth.

Mr. Smith: What did you have at issue in this case [277] you testified concerning?

The Witness: There was the value of the building, the land and building at 639 South Spring.

Mr. Smith: Your testimony had to do entirely with real estate in that case?

The Witness: That is what I was employed for, to express an opinion as to the value of that real estate.

Mr. Smith: Stock was involved, though, as an element in the value in this Los Angeles Stock Exchange case, too; was it not?

The Witness: Oh, yes, it was my appraisal on which the stock was determined. But I was only appraising the real estate. That is a mathematical calculation. They didn't call upon me to do that.

Mr. Smith: Your appraisal of the real estate you indicated was a mathematical calculation for that purpose?

The Witness: Why, certainly.

Mr. Smith: What do you mean by that?

(Testimony of Edward H. Allen.)

The Witness: If the real estate was worth \$100,000.00 and there was a thousand shares of stock out against it, what was the share of stock worth? They didn't call on me; anybody can figure that.

Mr. Smith: What was it worth?

Mr. Tonjes: That is objected to as being immaterial, your Honor. [278]

The Court: I think the examination is helpful, yet I think I will permit the witness to answer the question which has been asked of him, and then under cross-examination, of course, you may proceed with whatever you desire.

Mr. Tonjes: The point is, your Honor, I think the parties have been misinterpreting or have misstated themselves. I think Mr. Smith said, "You appraised the real estate on a mathematical formula." And I think the witness began to answer that question.

Mr. Blum: It was objected to.

Mr. Tonjes: I don't think that that was the thought that Mr. Allen conveyed. He said that the ultimate determination of the stock value would be a mathematical formula, which he wasn't required to make.

The Court: Of course, the record will show what his answer was. You may proceed with the direct examination of the witness.

Mr. Blum: You mean for Mr. Tonjes to proceed?

The Court: Were you through?

(Testimony of Edward H. Allen.)

Mr. Smith: I was going to ask a couple of more questions.

The Court: I think it would be more appropriate on cross-examination rather than on the voir dire.

Mr. Smith: Very well.

Q. (By Mr. Tonjes): Will you answer the question which was objected to, Mr. Allen? I think the question was will you please state what your opinion is as to the fair market value of the stock of the Hamburger Realty Company on October 13, 1941.

Mr. Blum: To which we renew our objection on the same grounds.

The Court: The objection will be overruled.

The Witness: \$3,900.00 per share.

Q. (By Mr. Tonjes): Your answer was \$3,900.00 per share? A. Yes, sir.

Q. Mr. Allen, were you employed to make an appraisal and determination of your opinion with respect to the fair market value on October 13, 1941, of certain shares of the capital stock of A. Hamburger & Sons, Inc., which were owned by Belle Alice Hamburger Nathan on October 13, 1940, as of October 13, 1941? A. Yes, sir.

Q. In that connection did you make certain inquiries and examinations in connection with that matter? A. I did, yes, sir.

Q. Did you arrive at a conclusion?

A. Yes, sir.

(Testimony of Edward H. Allen.)

Q. You examined the stipulation, a copy of which has been furnished you, and examined that stipulation and all the [280] exhibits attached thereto? A. Yes, sir.

Q. And you are familiar with all the facts contained therein as they relate to the value of the A. Hamburger & Sons, Inc., stock? A. Yes, sir.

Q. Now, with respect to your determination of the value of the stock of A. Hamburger & Sons, Inc., will you please tell the court in a general way what factors you considered in arriving at your conclusion?

A. I took into consideration, in arriving at the value of this stock, all the matters that I did in the previous mentioned corporation. The assets in this corporation are a little different than they are in the other corporation. They consist, though, of real estate and stocks.

I took into consideration all the elements that I have stated that are in the stipulation, and the exhibits. I took into consideration the history of this company, the history of its assets, the number of shareholders in this corporation, their background and their history, their ages and so forth, and all the matters that have been mentioned or testified to here in court, plus all my experience in appraising securities of this type.

Q. Did you also take into consideration the earning capacity? [281]

A. Yes, sir, the dividends that have been made and the money earned during the years.

(Testimony of Edward H. Allen.)

Q. Anticipated profits, earnings and income?

A. The future of the company, yes.

Q. The past record of the company?

A. Yes.

Q. The book value of the underlying assets?

A. Yes.

Q. Also the actual value of the underlying assets? A. Yes.

Q. The dividends paid? A. Yes.

Q. Whether the corporation was engaged in business or was a real estate holding corporation?

A. Yes, sir—well, I wouldn't necessarily say a real estate holding corporation.

Q. Yes. I think that is correct. You took into consideration the types it owned? A. Yes.

Q. Whether the corporation was in process of liquidation or expected to continue its activities indefinitely? A. Yes, sir.

Q. Did you take into consideration the general market conditions? A. Yes, sir. [282]

Q. Did you take into consideration the management? A. Yes, sir.

Q. And the prospective, if any, changes in the management? A. Yes, sir.

Q. Did you take into consideration whether or not the stock value was a minority interest?

A. Yes, sir.

Q. Whether or not the stock was stock in a closed corporation? A. Yes, sir.

Q. Did you take into consideration the fact that both Federal and State taxes would have to be paid on its income? A. Yes, sir.

(Testimony of Edward H. Allen.)

Q. Then you took into consideration all of the facts stipulated and set forth in that stipulation, and as shown by all of the exhibits attached thereto?

A. Yes, sir.

Q. And applying the knowledge and information you gained over the past years, to which you have testified, you arrived at a conclusion?

A. Yes.

Q. With respect to the fair market value of this stock, which was owned by Belle Alice Hamburger Nathan on October 13, 1940, as of October 13, 1941?

A. Yes, sir.

Q. Will you please state what that opinion is?

Mr. Blum: Objected to as incompetent, irrelevant and immaterial. The witness is not qualified to state an opinion as to the value of the stock.

The Court: Overruled.

The Witness: \$1000.00 per share.

Mr. Tonjes: Thank you, Mr. Allen. You may cross-examine.

Cross-Examination

By Mr. Blum:

Q. Mr. Allen, I show you Exhibit 1 attached to the stipulation of facts, and with respect thereto show you the net worth of the fair market value, which is \$3,927,153.64. Do you see that figure?

A. Yes, sir.

Q. I refer you to Paragraph 7 of the stipulation of facts, which shows there were 1000 shares of Hamburger Realty Company issued and outstanding on the basic date.

A. Yes.

(Testimony of Edward H. Allen.)

Q. I ask you if in arriving at your value of \$3900.00 you didn't take this \$3,927,153.64 and divide by one thousand shares?

A. I took that into consideration. That would be \$3927.00, I think, would be the figure exactly; wouldn't it? [284]

Q. Yes. And you reduced the figure to \$27.00, to bring it down to a round figure; is that correct?

A. I wouldn't say that. I don't think in putting a value on a stock in a closed corporation that that stock would sell for \$3927.15. I think it sells like any other personal asset; it sells in round figures.

Q. But the net result of your arriving at the value of \$3900.00 was to divide the fair market net worth by the thousand shares and bring it down to a round figure, because that is what you think the stock would sell for?

A. In my opinion, that stock on that day would have sold for at that time.

Q. That is what you arrived at on that date.

A. That is what I tried to do, what it would sell for or the fair market value of it. In my opinion, that was the fair market value of it.

Q. You say you took into account the earnings of the Hamburger Realty Company during the lifetime of the company, I believe were the words you used; is that correct?

A. Yes. I can't say that. I only have them back over a period of six or seven years. But from my knowledge of the lease and their business and one thing and another I know it has extended way back

(Testimony of Edward H. Allen.)

until—well, previous to 1923, way back, as a matter of fact, clear back to 1910 and '11.

Q. In other words, you are injecting into your valuation [285] the fact that A. Hamburger & Sons was an old department store here; is that correct?

A. Yes. I can remember it was the first store I ever remember 50 years ago.

Q. What relation would the fact that A. Hamburger & Sons was a department store have to the value of the Hamburger Realty Company stock, which was not the department store?

A. Because they were two pockets of the same family, a family-held closed corporation. Evidence shows here in all their dealings that they were both family corporations, with the exception one had, I think, six stockholders and the other had five; they were interrelated.

Q. Do you know who owned the stock on January 1, 1940, from your own knowledge?

A. Aside from figures, records?

Q. From your own knowledge or any other way, do you know who owned the stock on January 1, 1940?

A. In the Hamburger Realty Company?

Q. Either the Hamburger Realty or the A. Hamburger & Sons.

A. I couldn't answer that, I wouldn't know.

Q. Who owned the stock—

A. Unless I saw the books.

Q. Do you know who owned the stock in 1923?

(Testimony of Edward H. Allen.)

A. Not of my own knowledge. I never inspected their [286] books. I do know it has been in the family.

Q. How do you know in 1923 or prior to 1923 they were two family holding corporations and two pockets, money going from one to the other?

A. As I say, I know the family always owned the stock.

Q. How do you know that?

A. From general information and general knowledge. I have lived here for over 50 years, and I know the Hamburger family, its background and its history and the history of that property since 1907, when they moved down there, when they bought the property. It is just things like you know there is a Standard Oil Company. I have no knowledge of the records of the owners of the stock, unless I look at it.

Q. You have injected that into your fair market value of the Hamburger Realty Company stock as of October 13, 1941; is that correct? That is, that general knowledge you had of the Hamburger family.

A. Oh, no, no.

Q. You haven't? A. No.

Q. Now, I believe you stated you took into account the earnings of the Hamburger Realty Company. Presumably you meant the earnings as shown by Exhibit 2; is that correct?

A. Yes, sir.

Q. Will you show us how and in what manner you used those [287] earnings in arriving at the value of \$3900.00?

(Testimony of Edward H. Allen.)

A. I gave those earnings the consideration, a lot of consideration because they show what was returned from the assets that are in the A. Hamburger & Sons, which consists of some 29 parcels of real estate, consists of securities with a few exceptions, which are A-1, in my opinion. And these earnings that are reflected from that are evidence to me that the years that are shown here, it could be expected that those earnings would continue, with the exception of the loss of the \$18,000.00 a month as termination of the 20-year lease. Using those as a basis of earnings against the worth, actual worth, market value worth of the assets; all were used in arriving at the opinion that I have expressed as to the value of the stock.

Q. Well, just how did you arrive, how did you use that income, though? I understand you gave it consideration. You probably read Exhibit 2 maybe a dozen or fifteen times. But how did you give it consideration in arriving at the value of \$3900.00? Did you use any capitalization figure of income to arrive at \$3900.00?

A. Oh, no. I took that—yes, I took into consideration——

Q. Which is it, yes or no? Did you use any capitalization figure?

A. In arriving at the value?

Q. The value of \$3900.00. [288]

A. No, I never could do that and express an opinion on the witness stand, because that is not my opinion, if it is a mathematical calculation.

(Testimony of Edward H. Allen.)

Q. Have you ever valued a stock of any corporation in any manner other than valuing the underlying assets of that corporation and dividing—strike that. Have you ever valued the stock of any corporation by valuing the underlying assets of the corporation, deducting therefrom the liabilities of the corporation, arriving at its fair market value net worth and dividing that fair market value by the number of shares outstanding?

A. Did I ever do that otherwise?

Q. Have you ever valued the stock of a corporation, other than in that manner.

A. Yes, indeed. I don't know as I ever used that manner.

Q. Give us one instance in which you valued the—first, let me ask you this: When you say that you couldn't use the income in arriving at the stock, value of the stock, and then come on the witness stand and testify because the value of the stock is a mathematical formula, explain what you mean by that.

A. Because that isn't an appraisal. Say, a stock is paying \$6.00 a year. That is 6 per cent on \$100.00; isn't it? Now, that stock may be selling for \$40.00 a share or it may be selling for \$150.00 a share. What has \$6.00 got to do with it? [289]

Q. In other words——

A. I am employed to express an opinion of what these things are worth. If a stock is listed on the Stock Exchange you don't need to ask me what it is worth; it shows of record. What I am called upon,

(Testimony of Edward H. Allen.)

in this matter to appraise, is the assets. Most of the cases that we get in on, to appraise the value of the stock and closely held corporations, there is no income at all. Just because the stock or property doesn't have any dividend record or anything, doesn't mean it doesn't have value or market value.

Q. Tell me what you mean by mathematical formula?

A. Mathematical formula is to take six per cent or five per cent or three or any other percentage and say that an income of \$4.00 or \$10.00 is a certain percentage of a certain amount.

Q. Is that the way you valued this stock, by mathematical formula? A. No, no.

Q. I believe you said the value of a closed corporation is simply a mathematical formula and you couldn't capitalize the income. What do you mean by valuing the stock of a closed-family corporation, holding or otherwise, by use of a mathematical formula?

A. Mathematical formula would be if you determined, for instance, that the net assets and the net worth were, say, \$100,000.00, and there were 1,000 shares; each share would be \$100.00. But that comes after the establishment of the value. That comes afterwards. That is just a matter of a pencil and paper; that is all.

Q. In other words, it is your statement that at first you have to find the fair market value of the assets owned by the corporation? A. Yes, sir.

Q. And that that is the one and important fea-

(Testimony of Edward H. Allen.)

ture in valuing the stock of a family corporation?

A. You have to know what the net worth is, to start with.

Q. After you find that net worth it is merely a mathematical calculation, by dividing the number of shares outstanding into that, which will give you the fair market value of that stock?

A. That is correct.

Q. That is the method you used in valuing stock of family corporations?

A. No, no. Don't misunderstand me on that.

Q. I am afraid I have. I thought you said you considered the way to value family corporation, the stock of a family corporation was simply a mathematical formula after you had arrived at the fair market value of the underlying assets?

A. The fair market value of the underlying assets don't necessarily—it don't carry over into what is the fair market value of stock if you go to sell it. That is where you have to have an appraiser, because by your method of calculation I might determine that the fair market value of that stock is \$100.00 a share—I don't mean fair market value, but the net worth value when you go to sell it, as you do often in closed corporations, they will pay more for it than what the net asset worth is. And if you get into other situations they might pay less for it.

The appraiser has to determine what is the fair market [292] value as far as sale of that stock is concerned. We see that in stocks listed on the exchange they have a speculative value. They sell

(Testimony of Edward H. Allen.)

way above their net worth. And we see other stocks—I have seen stocks on the Los Angeles Stock Exchange that sell for more than the cash in the bank. So there is no mathematical way of arriving at the fair market value of anything, in my opinion.

Q. If you had had the cash on October 13, 1941, and bearing in mind that you could have purchased American Telephone and Telegraph stock, paying approximately $5\frac{1}{2}$ or $5\frac{3}{4}$ per cent on the selling price, and you could have purchased Consolidated Edison stock, paying approximately 9 or 10 per cent on a selling price, and you could have purchased Hamburger Realty Company stock at \$3,900.00, would you have purchased the Hamburger Realty Company stock in preference to those other stocks I have mentioned? A. I would, yes, sir.

Q. Even though \$3,900.00 would give you only about 4.1 per cent return on your money?

A. You are figuring I need the income off my money. I don't need it because I am earning money. I buy this kind because they appreciate in value through the years.

Q. What is going to appreciate in value?

A. Both the assets and the stock.

Q. The stock couldn't help appreciating in value if the [293] assets appreciate in value?

A. If the assets appreciate in value, with 29 parcels of real estate, they own what they have. The American Telephone and Telegraph Company has paid \$9.00 a share a year, and has for many years. The same way with your Edison Company.

(Testimony of Edward H. Allen.)

It is an investment. It is a hazardous investment. The fact it is paying 9 or 10 per cent shows it is a hazardous investment.

Q. Show me the 29 parcels of real estate you refer to.

A. I meant the corporation had——

Q. You have been testifying about Hamburger & Sons. I have been questioning you about Hamburger Realty, as to \$3,900.00. What are we going to get together and talk about?

A. I had——

Q. I asked you about Hamburger Realty. \$3,900.00 is the only figure I used so far. That is the figure you used on Hamburger Realty?

Mr. Tonjes: You can clear the matter up if you confine your questions to one corporation or the other.

Mr. Blum: That is all I have done.

The Court: We are arguing, gentlemen. Suppose you ask the witness a question and elicit an answer from him.

Q. (By Mr. Blum): Explain to me how you used the dividends of the Hamburger Realty Company with respect to arriving at the value [294] of \$3,900.00 a share?

A. The dividends through the years shows the corporation is liquid. They have been able to pay and have been able to earn sufficient to carry them along.

Q. Would you give me your definition of a liquid corporation or liquid assets?

(Testimony of Edward H. Allen.)

A. Liquid assets is one in which there are no liabilities against it; that is like money in the bank.

Q. You feel a piece of property located at 149 West 14th Place is like having \$6,000.00 in the bank? \$6,000.00 being its fair market value.

A. No, not that. You couldn't get your money on that in less than 30 days. You can get the money on the stock of the corporation that owns it right now.

Q. In other words, it is your opinion that all the executives of the corporation had to do would be to put this stock up for sale, stock of the Hamburger Realty Company, at \$3,900.00 a share and they would have handed it over with one hand and picked back the \$3,900.00 a share with the other?

A. No, within a reasonable length of time if offered for sale it would have brought \$3,900.00 a share. You would have to give somebody an opportunity to go through and see these assets.

Q. Did you in any wise capitalize the dividends in arriving at the value of \$3,900.00 per share? [295]

A. I didn't capitalize them, no. I took into consideration what they had been through the years and what the underlying assets were, that they were as sure as you can be of an investment, that they would receive \$3,900.00 a year for many years to come, and with their other assets that they would continue to earn.

Q. Now, assume, Mr. Allen, if you will, with respect to the Hamburger Realty Company, Exhibits 2 and 3 being the profit and loss statement and the

(Testimony of Edward H. Allen.)

dividend statement, were not in the record and that there was no income history and no dividend history, but simply the balance sheet, what, in your opinion, would be the fair market value of the Hamburger Realty Company stock on the basic date?

A. You mean without my making any other investigation than I have made?

Q. I mean having made the investigation you had, except, instead of finding these earnings, you found either zero, zero, zero, or losses both as respects the income, profit and loss statement, and as to the dividends, what would be the fair market value, in your opinion, of the stock of the Hamburger Realty Company?

A. That is assuming I had access to their assets?

Q. That is right.

A. I am satisfied in my own mind it would be more than I have expressed here. [296]

Q. You think it would be more than \$3,900.00 a share?

A. Yes, because that would necessitate me going and learning the individual income from each piece of property and appraising the property.

Q. Assuming you had the fair market value of the property, but we have the situation of having either no income in the company or losses, make either assumption you wish, and assume there is a non-payment of dividends or a deficit, so no dividends could have been paid——

Mr. Tonjes: That question is objected to as assuming matters not in evidence. We have stipulated

(Testimony of Edward H. Allen.)

what the earnings are and the dividend rate. I don't think it adds anything that is, at least, probative.

The Court: Overruled. This is cross-examination. We will allow some latitude since he makes his computations and calculations. Would you mind reframing that question?

Q. (By Mr. Blum): Assuming you had all the facts available to you with respect to the Hamburger Realty Company you now have, including your past experience, with the exception of instead of finding a history of earnings as shown on the profit and loss statement, being Exhibit 2, you found either no income, just zero, zero, or you found losses for those various years shown on Exhibit 2; and assume further that instead of finding a history of dividends paid, as you find on Exhibit 3, you found no dividends paid for [297] those years, what, in your opinion, would be the fair market value of the stock of the Hamburger Realty Company?

A. I couldn't answer that, unless I could go and appraise the assets there.

Q. You can assume that these assets are the fair market value and these are the values at which you would arrive if you went out and appraised them?

A. Well, it would sell for just what you stipulated the net worth of it is. The whole thing would have sold for \$3,927,153.00; you stipulated it was worth that.

Q. And the value of the stock would be \$3,900.27 a share?

(Testimony of Edward H. Allen.)

A. That is a dividend if you went out and sold the property for——

Q. I am not asking you what the value of the assets of the company are. I am asking what is your opinion as to the fair market value of the stock you appraised here, which you said was worth \$3,900.00?

A. It would be whatever would be allocated to each share out of \$3,927,153.00.

Q. There being 1,000 shares, that would make each share worth \$3,900.00 a share?

A. That is, assuming there is no taxes or income taxes or anything of that kind, profit taxes and so forth.

Q. That is right. Now, you said you took into account management. Will you tell us in what respect you used the [298] factor of management in arriving at the fair market value of the stock at \$3,900.00?

A. It has a lot to do with it in a family corporation, the management of the corporation and their policy, if, and so on. And the economy with which they operate the concern and so on, whether they are in disagreement with each other or whether they are friendly and careless. I took that into consideration.

With what I know about them, what I read in the stipulation here, it seems they have been quarreling among themselves, the big stockholders in it. And the train of thought following from that is maybe it has been a good thing for the corporation they

(Testimony of Edward H. Allen.)

have been quarreling. They have had a lot of high-powered attorneys watching that nobody stole this or stole that. They have wasted their assets in attorneys' fees and one thing and another.

As far as management is concerned, to my way of thinking, and what I see here, it don't require any management unless some of these stocks are called, or something of that kind. All you need is somebody to repair and maintain the property and collect the rent; strictly a holding corporation.

Q. In your opinion would harmonious management tend to increase or decrease the value of the stock, other factors being equal?

A. I have seen that both ways. I have been in family [299] corporations and when they are all happy-go-lucky and one wants to get a new automobile and another wants something, you wouldn't have any money left.

Q. I am not talking about a bunch of happy-go-lucky drunkards. I am talking about business people that get along, they are harmonious. Would that tend to increase or decrease the value of the stock, other factors being equal, as against those same people, those same factors and being unharmonious in in their management? Which way would the stock go with the harmonious management as against which way the stock would go with an unharmonious management?

A. It would go the best with a harmonious management; there is no argument there. If you have to

(Testimony of Edward H. Allen.)

assume all things being equal and they are all good business people, you are where you started. .

Q. With respect to the management of the Hamburger Realty Company, what is your opinion of that management from the testimony heard and the stipulation?

A. Just the same as in the other corporations.

Q. What is your opinion of the management of the Hamburger family and the A. Hamburger & Sons Corporation then?

A. As a holding corporation, as I stated, it doesn't take much management except for the physical assets. These houses and buildings and one thing and another require care. That and the investment of the securities from time to time [300] is all that is necessary.

Q. From your experience as a real estate appraiser, isn't it true it is good business management to sell real estate when real estate is on a very high market?

A. You mean it would be?

Q. I am asking if in your experience it wouldn't be.

A. That is the time to sell anything, when it is up; buy it when it is down.

Q. You heard the testimony of Mr. Milliken that proposals had been made to sell the real estate on what was considered to be an advantageous market, and because one director proposed, the other opposed it.

A. Yes.

Q. Now, what would be your opinion of the management of such a company as that, where appar-

(Testimony of Edward H. Allen.).

ently the market condition would make no difference with respect to the selling or purchasing policy of the corporation?

A. Well, now, if they are a holding corporation—you come back to the most successful holding outfit in the world, that is the Astor Estate in New York. They say, “Keep it when it is down. Keep it when it is up.” That is what has made people wealthy here in Southern California.

Q. Are you acquainted with the Vail family of California?

A. Indirectly, by reputation and so on.

Q. Would you say they were worth more in 1939 than in [301] 1927 or 1928 or 1923?

A. I couldn't answer you. Do you mean their real estate holdings?

Q. They were a large real estate holding family?

A. Very large, cattle ranchers.

Q. I am asking about the Vail family. You said many families have more money in California. I am testing your memory or knowledge of any particular fact on that.

A. Vails have made millions.

Q. They have lost millions, too; haven't they?

A. Yes. You have to have it before you can lose it.

Mr. Blum: We can recess any time that is convenient to your Honor.

The Court: You are not going to conclude this morning? You would like to have some time this afternoon?

(Testimony of Edward H. Allen.)

Mr. Smith: It will be an hour.

Mr. Blum: We will continue if you wish.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record.

We will suspend for a brief recess.

(A short recess.)

The Court: You may proceed, gentlemen.

Q. (By Mr. Blum): Mr. Allen, I believe you said you also took into [302] account, in valuing the Hamburger Realty Company's stock at \$3,900.00 per share, liquidation of the company or its expectancy to continue in existence; is that right?

A. I don't think I used the word "liquidation." I think that was in the question; wasn't it?

Q. Yes. I believe you answered yes, that you took into account——

A. Yes.

Q. ——the liquidation of the company or its expected continuance in business?

A. Yes.

Q. How did you take that factor into account?

A. Largely I took it into account that—assuming that there was a willing buyer and a willing seller, there was a ready market of all the assets of both corporations at that time, that there were investment trusts like the Trans-American Corporation, or something of that kind, that would have paid for all of it right now, at that time.

Q. That is, for all the assets in the corporation, would you say?

A. Yes, buy them out lock, stock and barrel.

(Testimony of Edward H. Allen.)

There was a market for it at that time, as there has been for *every* in that respect. I took that into consideration, what they would sell for. I took into consideration the liquidation of all the assets if they wanted to do it themselves, if they might [303] determine it would bring more money than the stipulated value here. I took that into consideration in arriving at the value of this stock. I took into serious consideration that members of the family would buy this stock. The Nathan stock, for instance, at that price is probably worth more to them than it would be to anybody else.

Q. Did you arrive at any conclusion with respect to whether it would be reasonable to expect the corporation to be liquidated or to continue in business?

A. Oh, I think the wise policy for it, if I had anything to do about it, would be to stay with it. It has a wonderful record. To keep it and just go on as they are going.

Q. In other words, your conclusion would be they would probably continue in existence, rather than liquidate?

A. No, I can't answer that, considering the ages of those people. But to their heirs I think, if they called upon me, I would say, "What you have is as good as there is. You had better keep it."

Q. Now, you also said you took into account the minority interest involved in this proceeding.

A. Yes, sir.

(Testimony of Edward H. Allen.)

Q. How did you take the fact there was a minority interest into account?

A. Well, there is ten per cent practically in one corporation and eleven point something per cent in the other. And [304] considering there were six stockholders, I believe, in one corporation, and five in the other, they are pretty near in the same level, you might say, being of the same family and so on. It is a substantial minority interest, in my opinion.

Q. How did you apply that minority interest to the value of the stock?

A. I took that into consideration in arriving at the stock in the corporation beforehand, that some of them owned, say, 20 per cent, and some of them owned 10 per cent. But in any division of it, in the participation or anything of that kind, it is all equal practically per share in value.

Q. Would your value have been any different for the Hamburger Realty Company stock if we were to value 50 per cent of the stock instead of 10 or 11 per cent of the stock?

A. I don't think so.

Q. Now, I believe you testified that you took into account the general market condition on the basic date? A. Yes, I did.

Q. What was the general market condition on the basic date?

A. The general market condition in Los Angeles was the best that it had been at any time since 1937. Things were pretty tough, you know, during the

(Testimony of Edward H. Allen.)

depression. In 1937 things started to pick up.

Then the President issued the order we were going too [305] fast and we would have to slow down a little bit. That affected us the same as it did the rest of the country. We were the first people to benefit, if there is a benefit, from a war; the contracts that the British Government allocated to this area in October and November of 1943.

Q. Who was the first one out here to get a contract?

A. The Douglas Aircraft and Lockheed were the first two.

Q. Did they get their contracts before the Bell Aircraft Factory and Curtis-Wright Factory in the east?

A. I couldn't answer that. I only know the local situation. With that employment and the high-priced people coming from the east, earning good money, it began to reflect in 1940. The reflection was greater in 1941, and it increased right on until Pearl Harbor.

Q. When you speak of the marketing condition, you are speaking of the marketing condition of the real estate?

A. Local conditions. When the department stores are doing business and merchants are doing business, it is reflected all the way through, you know. It takes longer for it to reflect in real estate than it does in merchandise.

Q. You didn't make any investigation as to what the stock market was doing at that time; did you?

(Testimony of Edward H. Allen.)

A. I watched the stock market all the time.

Q. Do you know whether it was on an upward trend or a downward trend at that time? [306]

A. I think on account of the war situation in Europe, some of the stocks there you might call export stocks had been cut off from the export trade, and some of them were seriously affected. But other stocks, on the other hand, and crops and so on were going up.

Q. You would say that Mr. Eitner's testimony and Mr. Walker's testimony that the stock market was on a slightly down trend at the basic date was not correct?

A. No, I wouldn't say that, if they checked it.

Q. You didn't check it, you don't know whether it was on an upward trend or downward trend?

A. I didn't check it as of that date, no.

Q. When were you first employed by the Respondent to act as an appraiser in this case, Mr. Allen?

A. Mr. Tonjes first called me on this, I think, about a month ago.

Q. At that time isn't it a fact Mr. Tonjes said he would like for you to appraise the May Company building at 8th and Broadway and Hill Streets, and the warehouse at Jefferson and Grand?

A. Yes.

Q. And possibly the 10th and Main building?

A. Yes.

Q. That was the only employment you had at that time; was it not? [307]

(Testimony of Edward H. Allen.)

A. That was what he mentioned, or the three properties that were in dispute.

Q. He didn't mention anything about testifying as to the value of the stock of the Hamburger Realty Company or stock of A. Hamburger & Sons?

A. In the first interview?

Q. Yes.

A. I don't recall whether that was mentioned in the first interview or not.

Q. Now, do you remember the first time that you were asked to express an opinion as a witness in this case, as to the value of the Hamburger Realty Company stock and the A. Hamburger & Sons, Inc. stock?

A. No, I don't.

Q. Well, was it today?

A. Oh, no, it was——

Q. Was it yesterday?

A. It was three weeks ago, I imagine.

Q. Three weeks ago?

A. It was shortly—I had two or three interviews with him. The first time I talked to him—I don't know definitely, I don't have any notes on it or anything.

Q. At that time were you asked to express an opinion as to both the value of the May Company store at 8th and Broadway and Hill, and the warehouse, and the 10th and Main [308] property, and the fair market value of the two stocks involved?

A. Well, as I recall, he said that they thought they could agree or stipulate on all the assets except those three. And it was the stock I would have

(Testimony of Edward H. Allen.)

to appraise, and I would have to form an opinion as to the value of those properties and add to the other stipulation; that is my recollection of it.

Q. Now, directing your attention to the A. Hamburger & Sons, Inc. stock, which you appraised at \$1,000.00 per share, and in that respect directing your attention to Exhibit 4 attached to the stipulation of facts, being the balance sheet of the A. Hamburger & Sons, Inc. now, that balance sheet shows, as you will note, a fair market net worth of \$3,475,516.03. Did you increase that fair market value in Column B by inserting in Column B opposite Item H, being the 104.167 shares of the Hamburger Realty Company, in the value you found?

A. Yes, I added \$409,079.43.

Q. That would give us approximately \$3,884,—

A. —595.46.

Q. After arriving at that total net worth you then divided that by the number of shares shown to be outstanding, in accordance with paragraph VIII of the stipulation, being 3,774.183 shares?

A. I took that into consideration, yes.

Q. Did you do the actual mathematics? [309]

A. I presume I did. I arrived at \$1,000.00 a share, the value of it.

Q. Before you got 3,774.183 at \$1,029.29, didn't you make the mathematical calculation I just asked you about?

A. Yes, certainly, I did.

Q. As in the Hamburger Realty Company you

(Testimony of Edward H. Allen.)

reduced that to round figures because family holding stocks sell in round figures? A. Yes.

Q. I believe you also testified with respect to A. Hamburger & Sons, Inc. that you took into account the fact that the assets of A. Hamburger & Sons, Inc. differed from the assets of Hamburger Realty Company; is that correct?

A. Yes.

Q. Did I quote you correctly?

A. Yes.

Q. When you say differ, do you mean differ in character?

A. No, not different in character, but the main underlying asset of the realty company is that property at 8th and Broadway. There is no other property comparable to that in the other corporation.

Q. In other words, let me see if I get you correctly, the assets of the two companies would, in your opinion, be substantially the same type of character, except the Hamburger [310] Realty Company has the May Company lease; is that correct?

A. Yes, they both have real estate holdings and both have stocks. The A. Hamburger & Sons have got more cash, if you figure Government Bonds as cash, than the other corporation has. But the other corporation has the tremendous income from the real estate.

Q. Now, how did you take into account with respect to the assets of A. Hamburger & Sons, Inc. the indebtedness of the stockholders to the company in arriving at your value?

(Testimony of Edward H. Allen.)

A. Well, from reading the notes, the promissory notes and the hypothecation of their stock to the corporation; those notes, in my opinion, are just as good as the Government Bonds, as far as security is concerned.

Q. Now, Mr. Allen, referring again to the L. A. Stock Exchange case, in which, I believe, you have already testified you were a witness, and directing your attention to Page 283, with particular reference to lines 18 and 19. You read as much of the rest of the page as you desire. If you want to read further, that is all right.

A. That is all right.

Q. I will ask you if you were asked the question: "What is your business now?"

To which you replied, "Real estate appraiser, real estate broker"? A. Yes, sir. [311]

Q. I will ask you if you were asked—directing your attention to lines 23 and 24 on page 283, you may read as much as you desire. I will ask you if you were asked the question: "How long have you been a real estate broker?" to which you replied, "Between 15 and 20 years"?

A. Yes, sir.

Q. And both those answers are correct?

A. Yes, sir.

Q. Can you tell us, Mr. Allen, when is the last time that you appraised the stock of a corporation prior to this present proceeding?

A. Within the last 30 days.

Q. What stock was that?

(Testimony of Edward H. Allen.)

A. The Ralph Huseman, Desmond's Department Store.

Q. Real estate corporation?

A. It was a holding company. He had about four and a half million dollars worth of property. He owns the ground where the Desmond Store is on Wilshire. He owns the store in Long Beach and properties in Bel-Air, Beverly Hills and things of that kind. Yes, it was a holding corporation.

Q. A real estate holding corporation, substantially? A. Yes, I would say so.

Q. How did you arrive at the value of that stock?

A. The same method I did here. Some of it was vacant property. Some of it was burdened with leases, like we have [312] here. He owned the building on Wilshire Boulevard. He leased that to the Desmond's Store—had a substantial lease on it—and the other half of the building he leased to Silverwood's Store.

He owned the ground in Long Beach, and that was leased to the Desmond Company stores. He had vacant property out on Wilshire Boulevard, two vacant properties. I arrived at my opinion of the fair market value of the vacant property, as well as the improved property.

Q. You were employed both to appraise the assets of the corporation and the stock; is that correct?

A. Yes, I would have to do that. You can't ever get any place unless you know what the underlying assets are worth.

(Testimony of Edward H. Allen.)

Q. You found the fair market value of the assets and deducted the liabilities from that, and arrived at the fair market value net worth of the Huseman Corporation?

A. The method was the same as here.

Q. I see. You arrived at the fair market value of the assets of the corporation and deducted the liabilities, and arrived at the fair market value of the net worth; is that correct?

A. Yes, but there were other things that entered into it.

Q. You did that; didn't you?

A. I took that into consideration. I first found out [313] what the net value of all his holdings were, and then it was so much per share, works out that way. But you have to have the other figures to start with. It don't make any difference how many shares there are, you have to find out the value first.

Q. You found the fair market value of the net worth by appraising the assets and deducting the liabilities?

A. Yes. You take other things into consideration before that, too.

Q. You take other things into consideration in valuing the underlying assets?

A. Yes.

Q. The location of the property, whether a long term lease or a short term lease or a substantial tenant, and one thing and another like that?

A. Yes.

Q. In valuing the assets of the corporation?

A. Yes.

(Testimony of Edward H. Allen.)

Q. After you found the fair market value and the net worth, in using all those factors, and going into all those things, you divided the number of shares outstanding into that fair market value for Mr. Huseman?

A. It didn't work out that way, in that case. I told them what the net worth of the property was. For me to put down the figure, how much it was per share, I didn't do that. [314]

Q. You came out with a fair market value of the net worth of \$4,000,000.00, then you just told Mr. Huseman his stock was worth \$4,000,000.00?

A. Yes. I told him the net worth of their property was \$4,000,000.00.

Q. Now, have you valued the stock, any other stock of any other corporation?

A. Yes, I am working——

Q. Say, since 1939?

A. Yes, I am working at the present time and have been for two years to determine the value of the stock in the Bolsa Chico Land Company.

Q. The Bolsa Chico Land Company's principal asset is oil land; is it not?

A. That is the principal asset. That is, that is their big income.

Q. That is what I mean.

A. Their big income is from oil wells, over a million dollars a year.

Q. You have been engaged, you say, for the last two years on that, appraising the assets of the corporation?

(Testimony of Edward H. Allen.)

A. Appraising the assets of the corporation, to determine out what the shares are worth per share.

Q. When you obtained the fair market value of the assets, you will tell them whatever the fair market value of [315] the net worth comes out is the value of the shares of stock?

A. I will put the value on the shares of stock.

Q. In that manner?

A. Take all that into consideration, yes.

Q. What else would you take into consideration?

A. What I am waiting for now, is geological reports of the oil content supposed to be under the ground.

Q. That is, to arrive at the fair market value of the oil land?

A. Yes. We have got to figure on the sale of the property and have to get that information before I can form an opinion as to what their net assets are worth.

Q. After you get that information and form your opinion as to what the fair market value of the assets are, you will then deduct the liabilities from that figure and arrive at what will then be the fair market value net worth?

A. I will give them the net worth. They will do that in the office. They will figure out how much that is, the share.

Q. Now, with respect to the prior questions regarding your taking into account the liquidation of the corporation or its continuing in business, I believe you testified that you assumed that the assets

(Testimony of Edward H. Allen.)

could be sold for the fair market value which is shown on Exhibit 1, for the Hamburger Realty Company; is that correct? [316]

A. Yes.

Q. And that the stockholders could then liquidate the corporation and each get out their prorata share of the proceeds of the sale; is that correct?

A. Well, I assume at this price here it could be sold in a lump for that sum.

Q. Yes.

A. And in liquidation I figured that they would employ somebody to appraise the assets and see whether they couldn't sell them themselves for a sum exceeding that. If they couldn't, it would be better to take that figure, of course.

Q. To take the figure which we stipulated?

A. Yes.

Q. Assuming that is the figure, that they would get for the sale of those assets, either individually, or in the lump sum, then they liquidated, it is your conclusion they would receive this \$3,900.00 a share in money; is that correct?

A. If the corporation sold for that, unless there were some charges against it; I don't know anything about it.

Q. Assuming this is on the balance sheet, the fair market value of the net worth was sold for that figure, then you didn't take into account the fact there might or might not be income taxes arising from the sale of those properties; did you?

(Testimony of Edward H. Allen.)

A. That is what I said about that. I don't know what their relation or condition is as far as income taxes are concerned. But I gathered, from reading this here, that the real estate values and so on, they have been through the wringer. I don't assume there would be any federal taxes on the sale of the properties.

Q. What is book value? What is the meaning of book value?

A. My understanding of it is that is the figure that is carried on the books of a corporation as to what the property stands then.

Q. In other words, their cost?

A. Well, it might be cost or it might be an imaginary figure picked out of the air, as is often done.

Q. Exhibit 1, being the balance sheet of Hamburger Realty Company, you see in Column A a book value for the 8th and Broadway and Hill Streets property under lease to A. Hamburger & Sons and May Company a figure, and in Column B is the fair market value of \$4,000,000.00?

A. Yes.

Q. If those assets are sold, that would be a profit made?

A. On that particular piece of property.

Q. Yes. A. There would be, yes. [318]

Q. Looking at 275 shares of Farmers & Merchants National Bank of Los Angeles, the book value is \$71,234.00 and the fair market value is \$106,700.00. There would be a profit there, would there not?

A. Yes.

(Testimony of Edward H. Allen.)

Q. As a matter of fact, in each one of those spots there would be a profit, with the exception of the Angelus Hospital Association and the Retail Merchants Credit Association? A. Yes.

Q. Now, with respect to the——

A. All these others, you see, you figure the depreciation that has been taken on that building down there; that building cost more than that figure there. As I understand it, the sale of that property, they have to account for that depreciation that has been taken.

Q. Assuming this was carried on the books right now, at the cost less depreciation, plus the cost of the land? A. Yes.

Q. If it wasn't, they would have a lesser cost remaining in it; wouldn't they? A. Yes.

Q. Now, we also have 845 South Broadway property, which stands them on the books at \$101,107.46. It shows a fair market value of \$315,600.00; is that correct? [319] A. Yes, sir.

Q. The only other asset shown in that entire balance sheet with a comparable cost is the one at 10th and Main Streets of \$200,006.40, with a fair market value of \$30,000.00; is that correct?

A. That is right.

Q. All the rest are much smaller items; is that correct?

A. Yes, but the fair market value of these items in here, as compared to over here, is a great decrease in any of those in total amount of money; that is true.

(Testimony of Edward H. Allen.)

Q. Well, without going into the actual figures, it would be fair to say if they sold these assets at a lump sum—let's do it this way: The total assets are \$1,947,164.18 book value.

A. Yes, sir.

Q. And the fair market value is \$4,557,632.27?

A. Yes, sir.

Q. And they would have over \$3,000,000.00 profit on the sale; is that correct?

A. That I couldn't answer.

Q. \$2,000,000.00?

A. I don't know their history on their income tax statement.

Mr. Tonjes: I think that is entirely too speculative.

The Court: I think it is rather speculative. [320]

Mr. Tonjes: Many of those items show losses based on the book value and fair market value, some to the extent of \$170,000.00.

Mr. Blum: He stated he was going to sell them as a block, and we have the total book value—

The Court: That is the answer of the witness. What he does and how he values it. To get the full extent of it we will have to determine that.

Q. (By Mr. Blum): You were assuming for both these corporations if they were liquidated the stockholders would receive the sums you have stated?

A. Yes, sir.

Q. Had you completed your appraisal of the 8th and Broadway and Hill property leased to the May Company before Mr. Tonjes told you we arrived at a stipulation as to the value?

A. No, sir.

(Testimony of Edward H. Allen.)

Q. Had you arrived at a preliminary conclusion as to the value?

Mr. Tonjes: I think this is all immaterial. We have stipulated what the value of the building is, stipulated it is \$4,000,000.00. If counsel can show some point in going into the matter, all right.

Mr. Blum: Could it go in under a motion to strike [321] and if it turns out it has no relevancy, I will be glad to have it stricken?

The Court: All right.

Q. (By Mr. Blum): Had you arrived at a preliminary conclusion as to the value?

A. Yes, I had in mind the fair market value of that property as of that date.

Q. Was that figure you had in mind greater or less than that which was stipulated to here?

A. Greater.

Q. Is it not a fact you permitted that difference to enter into your value arrived at in this instance?

A. No, sir.

Q. You didn't?

A. No. It made it very easy for me when they stipulated to the values of these properties.

Q. In arriving at the values which you have for both the Hamburger Realty and the A. Hamburger & Sons, Inc., what research did you do with respect to other securities or the security market?

A. I didn't do any, in particular. I know the security market, what dividend rates are and what money is worth, and all that kind of stuff. That is my business. I know it. But I didn't go to any

(Testimony of Edward H. Allen.)

financial chronicle or any of those [322] manuals and run them down, as to this particular one and that particular one, because I didn't think it was material.

It isn't comparable, in my opinion, what some holding company is doing in another city, that has entirely different assets than here, or some other outfit in a different line of business. I thought I had plenty to work on with this property itself.

Q. That is where you concluded to stop; is that correct?

A. Yes. I know the real estate market here; I feel I do.

Q. Mr. Allen, you have been using almost throughout your testimony the words "holding company." Where in the record do you have any reference to the fact either of these companies are a holding company?

A. Nothing, except the testimony of the witnesses you put on here. My own opinion, I think, is it is a holding company.

Q. What testimony, as to the witnesses we put on, was there that these were holding companies?

A. I think the last gentleman on the stand here.

Q. He was expressing an opinion in answer to questions asked by Mr. Tonjes with respect to it being a holding company?

A. I think his answer was correct.

Q. You say you think it was correct?

A. Yes.

(Testimony of Edward H. Allen.)

Q. And you gave weight to the fact that was a holding company, in arriving at the value; is that correct?

A. I took it into consideration. I didn't have to anticipate they were in a business, they were manufacturing something, they were building houses or buying and selling and the hazards of loss didn't involve in it. I had no information [324] that they were doing anything but holding this property and enjoying the benefits of that holding. That is the only information I have about either one of them.

Q. Where did you get the information they were just holding the property? Do you know the date they acquired any one of these properties?

A. No.

Q. Except possibly the May Company building?

A. No, I don't.

Q. For all you know these properties, each one of these other properties, may have been purchased the day before the basic date?

A. That is true.

Q. They may have been sold the day after the basic date?

A. That is true.

Q. You state that you are generally familiar with the securities market, I believe?

A. Yes; in its variations, yes.

Q. Do you know whether the market on real estate securities in Los Angeles was up or down at the time?

A. 1941, in October?

Q. Yes.

A. It was on the upgrade.

Q. It was?

A. Yes. [325]

(Testimony of Edward H. Allen.)

Q. Do you know what any particular security at that time of any real estate corporation was selling for, in relation to its assets?

Mr. Tonjes: Will you define the word "security?"

Mr. Blum: Stock, bonds, preferred stock, common stock or bonds.

Mr. Tonjes: There is a great difference between the interest of a stockholder and bondholder. I think we should confine ourselves to one or the other. Ask about both if you want, but one at a time.

Mr. Blum: I will give him any latitude. Common stocks, or preferred stocks or bonds.

Mr. Tonjes: The question is objected to as being too broad.

The Court: The question is whether he knew of the market of any of those things on the date. Is that correct?

Mr. Blum: That is correct.

The Court: You may answer.

The Witness: Of a holding company?

Q. (By Mr. Blum): Of a real estate company, holding or otherwise.

A. I don't know of a real estate company that had its stock listed on the Los Angeles Stock Exchange.

Q. Do you know of any over-the-counter transactions? A. No, I don't. [326]

Q. Would you have any way of finding out over-the-counter transactions?

A. Yes, I could inquire, but I don't know of a

(Testimony of Edward H. Allen.)

holding, real estate holding corporation, that you can buy stock over the counter even. The ones I am familiar with are ones that are closely held, like this one is.

Q. You made no investigation at all with respect to either the local or the national market trend or condition in determining the value of these stocks; is that correct?

A. Except my own knowledge.

Mr. Tonjes: What market do you mean?

Mr. Blum: The securities market.

The Witness: Except my own knowledge as I read it every day in the paper.

Q. (By Mr. Blum): Now, I believe you said you started the valuation of these properties about a month ago?

A. I think it was about a month ago, I am not sure.

Q. October, 1941, was four years ago. Do you remember the value of any security as of October, 1941, listed or unlisted?

A. No, I don't. Some I own myself I couldn't tell you what they were in '41. They are on the New York stock market and on the local stock markets, but that particular date I couldn't recall. [327]

Q. Could you tell us what the Dow Jones averages were——

A. For that date? No.

Q. Now, you stated that you would give the stockholder a reasonable length of time within which to sell this stock, in order to obtain the values you placed on it; is that correct?

A. Yes, sir.

(Testimony of Edward H. Allen.)

Q. What, in your opinion, is a reasonable length of time?

A. Stock of that value, 60 days. The physical real estate, I think six months is a reasonable length of time for valuable property to find a purchaser.

Q. In your opinion, then, this stock of either of the corporations could have been sold within 30 to 60 days for the value you placed on it?

A. If it had been offered for sale I think it could have been sold in 60 days.

Q. Do you have in mind any particular type of purchaser?

A. Yes, I have in mind the other stockholders in this corporation. I have in mind an investment trust buying all the property, buying it all, both corporations.

Q. What I am asking is do you have in mind any particular purchaser for the stock we have involved in this proceeding? [328]

A. Yes, when they bought this stock they would buy the——

Q. I am not asking about that. I want to know the particular purchaser for the 104 shares of one corporation and 425 shares of the other corporation we are valuing in this proceeding.

A. Yes, but all these questions, I misunderstood you. I thought you were talking about fair market value all the time, and you say you don't know whether the other people would sell or not. I don't either. I am forming an opinion of fair market value which means a willing buyer and willing seller.

(Testimony of Edward H. Allen.)

It would all bring, this sum I am putting on it, I am putting it on every share, would bring the sum I am putting on this share.

Q. Let's suppose the executors of this estate needed money to pay the estate taxes and other expenses of administration. They could have borrowed it. They didn't have to sell, but they decided they would rather sell the two blocks of stock. But the other stockholders did not want to sell their stocks, they wanted to hold them. Now, do you have in mind any purchaser or any type of purchaser for the stock owned by this estate, leaving out the other stockholders entirely, at the figures you have stated?

A. Yes, I think the subsidiaries of the Bank of [329] America would have purchased it. I think investment trusts would have purchased it, with a view in mind of buying the others from time to time—the age of those people—and acquiring all of it eventually. In other words, getting a foothold into a corporation of this type.

Q. Did you give consideration to the fact that a large block of this stock, I think approximately 33½ per cent of each of the stocks, is in the M. A. Hamburger Trust, the trustees involved?

A. Yes.

Q. And the sales would have to be by the trustees, and that there may or may not have been limitations on the right to sell stock?

A. Oh, yes, I took that into consideration.

(Testimony of Edward H. Allen.)

Q. Are you familiar with the bonds of the Loew's State Building, 6 per cent bonds of the Loew's State Building? A. Yes, sir.

Q. The Chester Fireproof Building?

A. Yes, sir.

Q. When is the Loew's State Building 6 per cent due; do you know?

A. That building was built in 19—I forget just the date. I appraised it and went to New York and testified about the bond issue you are mentioning there. I forget the date, the date it was built now. The Chester Williams [330] Building was built in 1926, I think, and that building was—Loew's State Building was built in '22 or '23, as I recall it.

Q. Do you know what the average price of those bonds were on the basic date involved here?

A. No, but I imagine they were in the '80's.

Q. And the Taft Building, 6 per cent, are you familiar with the Taft Building and 6 per cent bonds?

A. Yes, and their financial difficulties.

Q. And the Foreman & Clark Building, 6 per cent? A. Yes.

Q. And the Roslyn Fireproof Building, 4 per cent? A. Yes, sir.

Q. Do you know what the average price of those bonds, all of those I have mentioned, would have been at the basic date?

A. Well, I imagine the average price of the bonds would have been about 85, 86. Leave that Taft one out there, though; that went through at

(Testimony of Edward H. Allen.)

77. None of those properties you mentioned there are those bonds secured by anything but the building.

The Court: I suggest, gentlemen, we are getting a little bit far afield. I don't believe I care to hear you at length examine this witness about a group of other buildings. [331]

Q. (By Mr. Blum): Did you consider the securities to be liquid securities or non-liquid, with the meaning attached to liquid, of the salability of them, marketability of them right away or rather rapidly?

A. You mean those securities these corporations owned?

Q. No. I am talking about the Hamburger Realty Company stock and the A. Hamburger & Sons, Inc., stock.

A. I think if they had been offered for sale with the local brokers here they could have been sold within 60 days at that price.

Q. The securities we are valuing here?

A. The shares of stock.

Q. Did you consider whether the purchaser of these securities could or could not have elected a director in these corporations?

A. No. But I just assumed a man, if a man invested that much money in a corporation and moved in there he would have some representation on the Board, especially where they were quarrelling so much; they would like an ally, I imagine, any of them.

(Testimony of Edward H. Allen.)

Q. Well, without any accumulative voting to that stock, could 10 per cent have elected a director?

A. I don't know if there is any provision against cumulative voting of the stock. Is there?

Q. It is in the stipulation.

A. It is in the stipulation.

Q. Yes?

A. The stipulation can't overcome the section of the Civil Code that provides you can have it.

Mr. Tonjes: There is no provision for it. There is no stipulation it is provided.

The Witness: That wouldn't prevent the corporation from obeying the law, the fact you entered into a stipulation.

Q. (By Mr. Blum): You are assuming under the Code, then, that 10 per cent of the stock or 11 per cent, I believe you testified in one company, would give them the right to elect a director?

A. I can't answer that. The others might split it up, but they have got—if there are five directors they have five votes for each share of stock.

Q. Well, you say you assumed that the purchaser here would have a representative on the Board of Directors?

A. Yes, I assume a man that would go in there and put that sum of money in it would get acquainted, at least, with the Directors of the Board and talk with some of them. I don't think they have got to the place they wouldn't talk to anybody.

(Testimony of Edward H. Allen.)

Q. Did you assume that the purchaser could or could not have elected a director to the Board of Directors? [333]

A. I didn't assume that. I just assumed he could cast 50 votes in an election. Whether that would be enough to put him on, if he wanted to be on the Board, I couldn't answer.

Q. Did you take into account the effect of any war or a war scare on inflation?

A. Yes, I have lived through the last one and this one, too, and it was in my mind.

Q. Did you take that into account in arriving at the value of the securities at all?

A. As of that date, you couldn't have done that as of that date, but now you can. And the main value now of that property is the depreciation that can be taken on all these buildings. If a man could have purchased that property or those shares of stock on that date at the price, in my opinion, they were worth, he would have made a very lucky investment.

Mr. Blum: I didn't ask you that. I move it be stricken.

The Court: It will be stricken.

Q. (By Mr. Blum): I asked you, did you take into account the fact there was a war going on and a war scare at the basic date, and its effect on inflation?

A. Yes. That was reflected in the market, both the security market and every other market as of October, 1941.

Q. In what way? [334]

(Testimony of Edward H. Allen.)

A. Well, everybody was tense and nervous, and they were letting the big tremendous contracts for ships and food, sugar, cereals of every nature and description, letting these contracts for steel goods.

Q. How was it reflected in the market?

A. Equipment and machinery, everything of the kind, there was a great demand all of a sudden in this United States for things along that line. The Germans were in Russia and it looked black from a war angle. It looked like we were going to get in, and we were preparing, not necessarily for ourselves, but we were preparing material for others, and there was activity.

Q. And the black look of the war, what effect did that have on the security market?

A. Some securities skyrocketed clear up out of sight, if they had a contract.

Q. Name one.

A. Airplane factories.

Q. In 1941 name me any one.

A. I don't know which they were.

Q. How do you know they did? Give an example.

A. Douglas.

Q. What was it selling for?

A. I don't know.

Q. Was it selling higher or lower in October, 1941, [335] than it was in August of 1937?

A. Don't go back that far. They just got their contracts from the British in October and November, '39.

Q. Do you know which it was? I can go back.

A. No.

(Testimony of Edward H. Allen.)

Q. You answer whether you know or not.

A. No, I haven't any record here of any of those things.

Mr. Blum: That is all.

Redirect Examination

By Mr. Tonjes:

Q. When you stated that you weren't familiar with how long the assets were held by the various companies you knew, of course, that the property known as the May Company property had been owned for many years by the Hamburger Realty Company; did you not?

A. Yes. I can remember when they bought it.

Q. The lease was in evidence and it shows that.

A. Yes.

Q. That is the principal asset of the Hamburger Realty Company, isn't it? A. Yes, sir.

Q. Were you here yesterday when Mr. Milliken testified that there was practically no activity, business activity at all in the corporations with respect to sales and [336] acquisitions? A. Yes, sir.

Q. And from that you concluded that these properties were owned for some time? A. Yes.

Q. Now, one other question. When you testified that you divided the number of shares of the corporations into the total value of the assets of the corporations—the total value of the assets or the net worth, do you intend to convey the thought that was all you did, to arrive at your conclusion?

A. No.

(Testimony of Edward H. Allen.)

Mr. Blum: That is objected to as being ambiguous, argumentative, what he intended to convey; it is what he did.

The Court: Overruled. He may answer.

The Witness: No, sir.

Q. (By Mr. Tonjes): You took many other factors into consideration? A. Yes, sir.

Q. Now, with respect to all of the securities which were called to your attention, the securities on the Chester Williams Building and the Foreman & Clark Building, on all those, you recall they were mentioned to you a few moments ago?

A. Yes. [337]

Q. They would clearly represent an obligation to pay, would they not, and contain no interest in any fee of any property? A. That is true.

Mr. Blum: That is objected to as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness.

The Court: That is true. He has answered. We will let his answer stand.

Mr. Tonjes: That is all. The respondent rests, your Honor.

The Court: Is there any further cross-examination?

Mr. Tonjes: Pardon me.

Recross-Examination

By Mr. Blum:

Q. Now, Mr. Allen, I asked you on cross-examination to show us how you used each one of the

(Testimony of Edward H. Allen.)

factors in arriving at your value of the two corporations. And you said you considered them. Now, on redirect examination you answered the question whether you took into consideration and used, as I understand it, the other factors in arriving at the value which you arrived at, these other factors. Now, I don't want to take the time to go through each one of those factors again. Will you tell us how you used these other factors, other than the asset value of the corporation in arriving [338] at this value?

A. Well, the factor of dividends or the factor of earnings, for instance, were sufficient and had been sufficient through a bad depression we had here, to carry on these corporations, pay the expenses and still make money.

Q. How do you know that? Do you have the earnings for 1932 and 1933, 1931 before you?

A. No.

Q. How do you know they had any income from those years?

A. I know May Company never defaulted in an obligation; Moody's Manuals show that.

Q. Hamburger Realty Company wasn't receiving any income from May Company in 1931, 1932, 1933?

A. No, they didn't need any. They were in such a liquid position all the time they didn't need it.

Q. I see.

A. From that angle there was sufficient——

(Testimony of Edward H. Allen.)

Q. You are testifying that Hamburger Realty Company and A. Hamburger & Sons, Inc., had a net income in 1931, 1932, 1933, of your own knowledge?

A. No, I am not testifying to that at all. I said they had sufficient money to go through a very severe depression, and they went through it.

Q. General Motors had enough to go through; didn't [339] they? A. Yes.

The Court: I suggest you gentlemen are now arguing with each other and not helping the court.

Q. (By Mr. Blum): Go on with your explanation as to how you used these factors.

A. That was the factor I used, as for security, the income these corporations had gave them security to go through a depression and come out with their basic assets, which are real estate. In my opinion, as long as you have got a piece of real estate that is free and clear, you own something in Los Angeles. You have got a mortgage on it, it is a different story. Their property is free and clear. That is their basic asset. That is where they have made all their money.

Q. That is how you used the income fact they had the real estate producing income?

A. Yes, they have got real estate producing income and they have other securities, too, that are as good as gold.

Mr. Blum: That is all.

Mr. Tonjes: That is all.

(Witness excused)

Mr. Tonjes: That concludes the respondent's case.

The Court: Is there any rebuttal? [340]

Mr. Blum: No rebuttal, your Honor.

The Court: Very well. The proceeding will stand submitted. Do you desire to file briefs?

Mr. Blum: Yes, sir.

The Court: Will briefs under the rule be sufficient, 45 days?

Mr. Blum: Yes, sir, your Honor.

Mr. Tonjes: That will be satisfactory, your Honor.

The Court: You may file contemporaneous briefs within 45 days.

Mr. Tonjes: That is satisfactory.

The Court: You will have 35 days after the filing of briefs on one side within which to file a reply brief, if you desire to file a reply brief.

Mr. Blum: Yes.

The Court: Very well. Thank you, gentlemen.

(Whereupon, at 1:00 p. m., on Friday, October 5, 1945, the hearing in the above entitled matter was closed.) [341]





